88-1578

Supreme Court, U.S.
FILED
MAR 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

GABRIEL THORNOCK, by his next friend and mother LANA (THORNOCK) BAUGH and LANA (THORNOCK) BAUGH,

Respondents,

vs.

BOISE INDEPENDENT SCHOOL DISTRICT # 1,

Petitioner.

ON WRIT OF CERTIORARI FOR THE SUPREME COURT OF THE STATE OF IDAHO

PETITION

Stewart A. Morris
Counsel for Petitioner
P. O. Box 1001
Boise, Idaho 83701
(Tel: 208-336-1430)

23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the mainstreaming preference of the EACHA require that a handicapped child be placed in a regular classroom where he cannot achieve passing marks or advance from grade to grade even with support services?

2. Does a Local Education Agency have a duty to offer a free appropriate public education (FAPE) to all handicapped children placed voluntarily in private schools by their parents and who are not seeking public enrollment but only comparable services at the private school?

3. Can parents who do not cooperate with the Local Education Agency in providing records and consenting to an evaluation of the handicapped child recover damages for an alleged inappropriate offer of an educational program for that child?

LIST OF PARTIES

1. Gabriel Thornock. Gabriel Thornock was the plaintiff in the proceedings below, and respondent in the Idaho Supreme Court. He is a handicapped child entitled to benefits under the Education for All Handicapped Children Act, (EACHA 20 USC §1400 et. seq.)

2. Lana (Thornock) Baugh. Lana Baugh is the natural mother of Gabriel Thornock, and was a party throughout these proceedings as Gabriel's guardian.

3. Boise Independent School District #1. This party is the Petitioner herein, and a local education agency of the State of Idaho, receiving Part B funds under the Education for All Handicapped Children Act. Petitioner is the largest school district in the State of Idaho. Petitioner was the defendant in the judicial proceedings brought in the District Court of the State

of Idaho, and the appellant in the Supreme Court of the State of Idaho.

4. Department of Education, State of Idaho. This party is the state education agency for the State of Idaho, overseeing Part B funding to local education agencies under the Education for All Handicapped Children Act. The state department was initially named as a defendant in the District Court proceedings, but then dismissed from the proceedings upon motion of the plaintiff Thornock. Subsequent to the opinion of the Idaho Supreme Court, and the filing a Petition for Rehearing by Petitioner herein, this party was permitted by the Idaho Supreme Court to file an Amicus Curiae Brief supporting Petitioner's position herein.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
LIST OF ALL PARTIES	2
APPENDICES	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	4
GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED	4
STATUTES AND REGULATIONS INVOLVED	5
STATEMENT OF THE CASE	6
A. NATURE OF THE CASE	6
B. STATEMENT OF FACTS	12
C. REASONS FOR REVIEW ON CERTIORARI	24
ARGUMENT	
A. PETITIONER'S DUTY WAS TO MAKE COMPARABLE PART B FUNDED SERVICES AVAILABLE, NOT FAPE	27
B. MAINSTREAM PREFERENCE - DOESN'T REQUIRE WAREHOUSING RETARDED CHILDREN IN REGULAR CLASSROOMS	42
C. PARENTAL FAILURE TO COOPERATE	51
APPENDIX	

APPENDICES

1.	Idaho State Supreme Court Order Denying Petitioner's Petition for Rehearing	A-1
2.	Opinion of the Supreme Court of the State of Idaho	A-2
3.	Final Judgment	A-3
4.	Opinion of the District Court of Ada County	A-4
5.	Opinion of the Administative Review Officer	A-5
6.	Opinion of the Administrative Hearing Officer	A-6
7.	United States Statutes and Code of Federal Regulations	A-7
8.	November, 1983 Letter from United States Department of Education to Wyoming Department of Education Office of Handicapped Children	A-8

TABLE OF AUTHORITIES

1. CASES	PAGES
Cain v. Yukon Public School, 775 F.2d 15 (10th Cir. 1985)	40
Board of Education of East Windsor Regional School v. Diamond,808 F.2d 987 (3rd Cir. 1986)	47
Dubois v. Connecticut State Board of Education, 727 F.2d 44 (CA Conn. 1984).	54
Evans v. District No. 17 of Douglas County, Nebraska, 841 F.2d 824 (8th Cir. 1988)	40
Geis v. Board of Education of Parsippany-Troy Hills, Morris County, 1985-86 EHLR 557:135; F.2d 575 (3rd Cir. 1985)	29
Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986)	29
Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 1976, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)	43, 45, 47
Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981)	36

Roncker v. Walters, 700 F.2d 1058 (CA Ohio 1983), cert. denied 104 S.Ct. 1986, 464 US 864, 78 L.Ed. 2d 171 — 45

Quackenbush v. Johnson City School District, 716 F.2d 141 (2nd Cir. 1983) — 46

2. United States Statutes

a. 20 USC §§1401 (18)(19) — 5, 43

b. 20 USC §1413(a)(4)(A) and (B) — 5, 20, 21

3. Code of Federal Regulations

a. 34 CFR §76.651 — 5, 32, 36

b. 34 CFR §§300.400 -300.452 — 5, 20, 21, 31, 32, 36

c. 34 CFR §300.550(b)(1) — 5, 44

4. Texts and Articles

Education for Handicapped Law Report (EHLR)

a. EHLR 211:110 — 38

b. EHLR 211:263 — 37

c. EHLR 211:280 — 37

d. EHLR 211:294 — 35

e. EHLR 211:414 — 35

f. EHLR 213:124 — 49

g. EHLR 504:178 40

h. EHLR 504:227 46

i. EHLR 504:255 46, 47

j. EHLR 557:135 29

12 Ed.Law Reporter, 212 45

OPINIONS BELOW

The following Opinions Below are attached hereto in the Appendix as A-1 through A-6, as follows:

A-1: Idaho State Supreme Court Order Denying Petitioner's Petition for Rehearing;

A-2: Opinion of the Supreme Court of the State of Idaho;

A-3: Final Judgment;

A-4: Opinion of the District Court of Ada County, in and for the State of Idaho, which Petitioner appealed to the Idaho Supreme Court;

A-5: Opinion of the Administrative Review Officer affirming the decision of the Administrative Hearing Officer;

A-6: Opinion of the Administrative Hearing Officer.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

Review is sought for the opinion of the Idaho Supreme Court attached as A-2, which

was filed July 1, 1988, rehearing for which was denied by Order of the Idaho Supreme Court on December 29, 1988. Review in this Court is sought under the authority of 28 USC §1257.

STATUTES AND REGULATIONS INVOLVED

This case generally involves the provisions for the Education for All Handicapped Children Act, 20 USC §1400 et seq. It also involves the EAHCA regulations promulgated thereunder, 34 CFR §300 et seq and the EDGAR regulations relevant thereto, 34 CFR §76 et seq. This case involves an interpretation of the following statutes and regulations, which are set out verbatim in Appendix A-7 as follows:

20 USC §1401 (18)(19);

20 USC §1413(a)(4)(A) and (B);

34 CFR §76.651.

34 CFR §§300.400-300.452;

34 CFR §300.550(b)(1);

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Prior to the 1983-84 school year, Gabriel Thornock's parents unilaterally enrolled Gabriel in a private parochial school within in the boundaries of the Petitioner school district, and applied to the Petitioner school district for certain special education services under the EAHCA, including the services of a full-time one-to-one classroom aide for Gabriel at the private school. Gabriel's I.Q. at the time was determined to be 37, and he functioned in the trainable mentally retarded category. Although his chronological age was nine years and seven months, his mental age was three years and four months. Despite this, Gabriel's parents and the private school determined, without consultation with the Petitioner school district, that Gabriel would be placed in a regular third grade

classroom. Despite the fact that Gabriel was placed in a regular classroom, he had no chance of receiving passing marks or advancing from grade to grade. Gabriel's parent not only unilaterally selected the private school placement with no consultation with the Petitioner, but refused to make Gabriel's previous school records available to the Petitioner school district from other schools outside its boundaries from which Gabriel was transferring.

The first Child Study Team meeting, a meeting of both school district personnel, private school personnel and Gabriel's parent, was held on August 29, 1983, prior to the start of the school year. The purpose of this Child Study Team meeting was to develope an independent education program (IEP) for Gabriel. However, Gabriel's parent had not turned over previous school records requested by

Petitioner, nor consented to Petitioner's request to conduct a comprehensive multi-disciplinary evaluation of Gabriel. The meeting therefore had to be rescheduled to November 15, 1983. The records were not disclosed to the Petitioner until several days before the second meeting of the Child Study Team, more than two months after the school year had begun. On advice of its attorney, the school district denied the requested services of a one-to-one aide, and administrative proceedings were initiated to resolve is this dispute. The other related services for Gabriel, including speech, physical and occupational therapy were agreed upon and provided throughout the ensuing dispute. Hence, the true issue was over the responsibility of Petitioner to provide or pay for a one-to-one full-time aide for Gabriel at the private school he was enrolled in unilaterally by his parent.

The administrative hearing officer found in favor of the Petitioner school district, ruling that the Petitioner had a free appropriate public education available (FAPE), and that due to the unilateral selection of the private school by Gabriel's parent, as well as the parent's failure to cooperate by consenting to an evaluation and providing education records, the school district was not only not obligated, but was prevented from, developing a free appropriate public education for Gabriel.

The state administrative review officer affirmed the decision of the administrative hearing officer and Gabriel initiated judicial proceedings in the Idaho District Court through his parent to recover damages -- not only for the cost of the one-to-one classroom aide provided Gabriel in the regular third grade classroom at the private parochial school, but for Gabriel's tuition

at that school.

The District Court, without taking additional evidence, and indicating that it would give no weight whatever to the findings and conclusions of the administrative and review hearing officers, completely reversed the findings and conclusions of both administrative forums. The District Court awarded Gabriel and his parent damages for both costs of tuition and the one-to-one aide, which judgment was affirmed by the Idaho Supreme Court.

In affirming the District Court's judgment, the Idaho Supreme Court has established an erroneous precedent clearly not intended under the EAHCA. The Idaho Court has construed the "mainstreaming" preference under the Act that a child be placed in the least restrictive environment, (i.e. that he be educated to the maximum extent appropriate with non-handicapped

children), to mean that a mentally retarded, multiply handicapped child without any hope of receiving passing marks for advancing from grade to grade be placed in a regular classroom setting with non-handicapped children. In reaching this conclusion, the Idaho Supreme Court further established a second precedent never contemplated by the Act, that is, that a school district must develop and propose a free appropriate public education program for every handicapped child within its jurisdiction, despite the fact that the handicapped child is neither enrolled in or seeking a public education. The Idaho Supreme Court held that this burdensome obligation existed despite the failure of the parent to cooperate in consenting to an evaluation or providing education records. This ruling is contrary to the clear mandate under the EAHCA and federal regulations that a school

district need not offer an FAPE to handicapped children unilaterally placed in private schools by their parents (although it must make available program benefits comparable to those provided handicapped children in public schools through federal funds granted under the EACHA).

B. STATEMENT OF FACTS

In June of 1983, Gabriel's parent informed the Petitioner Boise School District that she was changing Gabriel's residence from a neighboring school district to the jurisdiction of the Petitioner district. At an informal meeting on August 16, 1983, with school district officials, Gabriel's parent made it clear that she was not interested in enrolling Gabriel in one of Petitioner's public schools, but that she had already re-enrolled Gabriel in a private parochial school within the Petitioner's boundaries, and would be requesting the

Petitioner to provide a number of related services. This included the services of a full-time one-to-one aide in the regular third grade classroom which Gabriel would attend. At no time thereafter did Gabriel's parent ever indicate any interest or request that a program involving placement in a public school be developed. Chief Justice Shepard's dissenting opinion probably best describes Gabriel's functioninng level and handicapping conditions at the time, at 88 ISCR p.676:

> "Gabriel's intelligence quotient was determined to be 37. He functioned in the trainable mentally retarded category. Although his chronological age was then nine years and seven months, his mental age was three years and four months. Other tests indicated mental ages of between two and three years. Evidence indicated that the intellectual achievement of such a child may reach as high as six years of age. Gross motor skills were functioning at a two to three-year-old level, and indicated spasticity in all extremities. His speech and language skills were at an age level between 28 and 32

months, with one and two-word utterances." (See A-2 at pp. 42-43)

As was conceded by all, Gabriel was placed in a regular third grade classroom by his parent, solely for socialization purposes, with no anticipation that he would receive passing marks or advance from grade to grade academically. In fact, while Gabriel was in the regular classroom, the function of the one-to-one aide was to provide him with special individualized instruction, while the rest of the classroom was receiving academic instruction from a regular classroom teacher (who was not certified in special education).

Despite repeated requests by the school district officials, Gabriel's parent refused to provide education records from Gabriel's prior schools, or to permit school district officials to engage in a comprehensive educational evaluation of Gabriel and

to determine his functioning levels. This information was necessary for school officials to properly determine Gabriel's needs and what related services should be provided. In the first formal Child Study Team meeting on August 29, 1983, Gabriel's parents had still not provided the district officials with permission to evaluate Gabriel, or previous education records. The school officials were unable to properly determine Gabriel's needs, and therefore it was agreed that the meeting would be rescheduled for November 15, 1983.

At the November 15, 1983 meeting, it was agreed that Gabriel would be provided various related services by school district specialists, such as speech and physical therapy. However, on advice of its legal counsel, the Petitioner declined Gabriel's request to pay for the one-to-one classroom aide. This advice was based on the reason

that comparable benefits were not being provided to public school children by the Petitioner with funds provided under the EAHCA. It again was conceded by all persons involved, both Gabriel, his parent, and legal counsel, as well as both public and private school officials at the meeting, that the real dispute was not whether Petitioner could provide Gabriel a free appropriate public education should he desire to enroll in the public school system, but whether the school district should be financially responsible for the services of the one-to-one aide being provided Gabriel in the regular private school classroom. At that meeting, however, school district officials indicated that should Gabriel become interested in public school enrollment, a number of placement options were available to him, which were described at that time. None of these

options included enrolling Gabriel in a regular classroom setting, and his attorney and parent voiced the objection that the hypothetical alternatives described, and specifically a placement mentioned in a contained classroom in a public school, would not constitute a FAPE because they were not in the "least restrictive environment".

Although all related services were agreed upon, except the services of the one-to-one aide, Gabriel initiated administrative proceedings not only for reimbursement of the cost of the one-to-one aide, but for the tuition cost at the private parochial school, despite the fact his parent and counsel conceded they had never applied for nor were they interested in a public school education.

Consistent with Petitioner school district's position and advice of legal

counsel, the hearing officer found in Petitioner's favor.

Following a 3-day evidentiary hearing, the hearing officer issued findings of fact, conclusions of law and a decision that Gabriel was not entitled to an award of tuition for educational costs at the private school, or reimbursement for the costs of hiring a one-to-one aide. Significantly, the hearing officer found that Gabriel's parent had notified the Petitioner school district in June and later by letter dated August 18, 1983, that Gabriel was not seeking public enrollment. This was because he had already been enrolled at the private school, and the parents were only requesting physical therapy, occupational therapy, speech therapy, and the one-to-one aide. (Finding #6, at page A-5, pp. 7-8). In Finding #7 (A-5, pp. 8-10), the hearing officer further found that:

> "The consistent testimony at the hearing, and the documentary evidence introduced, indicated that Mrs. Baugh and her husband had decided on placement in St. Joseph's School. At no time did Mr. and Mrs. Baugh make application to the district for public school placement."

In Finding #9 the hearing officer found that Gabriel's parents and their attorney were placed on notice prior to the Child Study Team meeting that, based upon a written legal opinion by the school district's attorney, the school district's position was that Gabriel was not entitled to the services of the one-to-one aide they were requesting. (A-5, pp. 11-13) In Finding #10, the hearing officer found that there was no dispute in the hearing as to whether or not the district could provide an appropriate free public education, and that the school district could provide and Gabriel would have had available to him a free appropriate public education were he

enrolled in the public schools. The hearing officer further found that if Gabriel were in public enrollment, he would not be provided the aide services he was requesting at the private school, and thus was not entitled to said service at the private school because it was not a service comparable to benefits provided public school children through EACHA funds. (See Findings #11 at A-5 pp. 14-16)

The hearing officer concluded as matter of law that the provisions of 20 USC §1413(a)(4)(B) and 34 CFR §300.400 (which require school district financial responsibility for children placed in private schools by the school district), did not apply to nor impose financial obligation upon the Petitioner school district because of the voluntary placement of Gabriel in the private school by his parent. The hearing officer concluded:

> "In view of the private placement of Gabriel by the parents into St. Joseph's School, it must be concluded that the legal obligations imposed by the foregoing sections of the Education For The Handicapped Act and Regulations do not apply in this case."

The hearing officer recognized the distinction under the EAHCA and regulations between the legal duties local education agencies owe to handicapped children referred to private schools by the school district, as opposed to those referred to a private school voluntarily by their parents. See Conclusion of Law #2, (A-5, pp. 17-18) 20 USC §1413(a)(4)(A) and Regulations 34 CFR 300.450 through 300.452. The hearing officer then concluded in Conclusion of Law #4 that:

> "Under the provisions of the Act and the regulations applicable to this case, Boise School District is not obligated to provide to Petitioner a free appropriate public education. Rather, the district is required to provide an opportunity for equitable participation in Part B funded program benefits consistent with the number of

eligible private school students and their needs." (A-5, pp. 20-21)

Since the Boise School District had previously determined that the aide services requested by Gabriel were not of the type that would be provided public school children, there was no obligation to provide the same to Gabriel at his private school under its obligation to provide for equitable participation in comparable Part B funded benefits.

The decision of the hearing officer was subsequently affirmed by the State Board of Education review officer. (A-5 pp. 1-25)

The District Court, however, without receiving any additional evidence (by consent of the parties) and stating it would give no weight whatsoever to the administrative proceedings, completely reversed the findings and conclusions of the hearing officer and review officer. Completely

ignoring the fact that Gabriel and his parent were not seeking a public education, the District Court and the Idaho Supreme Court both determined that Gabriel was not offered a free appropriate public education, and that therefore the Petitioner school district should be liable in damages. The District Court and Supreme Court reached this erroneous result despite the fact that neither party at the administrative hearing or district court level contended that the dispute was over anything more than whether or not a one-to-one aide would be provided to Gabriel at the private school. There was no issue litigated or raised over the fact that Gabriel was not seeking a public education, or whether or not the Petitioner could offer and make available a free appropriate public education if Gabriel had changed his mind and decided to ask for one.

In the process of reversing the

findings and conclusions of the administrative hearing officers, both the District Court and the Supreme Court of Idaho ruled that the Petitioner school district was obligated to develop and offer a full blown free appropriate public education to Gabriel, even though he wasn't seeking a public education. The courts further ruled that the mainstreaming preference under the EACHA required that Gabriel had to be placed in a regular classroom setting, since that was appropriate and constituted the "least restrictive environment".

C. REASONS FOR REVIEW ON CERTIORARI

Petitioner contends that a writ of certiorari should be granted in this case under Supreme Court Rule 17 for the following reasons:

1. The Idaho Supreme Court has established a legal precedent in its opinion that is not only a blatant misinterpretation

of the EAHCA and Regulations but imposes financial and personnel burdens so extreme upon local education agencies as to constitute a substantial hindrance to the efficient provision of special education and related services to all handicapped children in this state. The EAHCA and Regulations do not require local education agencies to develop and offer a FAPE to handicapped children voluntarily placed in private schools by their parents; rather, the law requires that these handicapped students be offered equitable opportunities to participate in comparable EACHA funded services. The requirement imposed by the Idaho Supreme Court opinion to develop an offer of FAPE to even those handicapped children who are not even applying for a public education, is a tremendously burdensome and unnecessary mandate which is not set forth under any rational interpretation of the law.

2. The Idaho Supreme Court has completely misinterpreted the concept of mainstreaming encompassed in the statutory and regulatory preference for placing handicapped children in the least restrictive environment. The federal statute and regulations only require that a handicapped child be educated with non-handicapped children to the maximum extent "appropriate", and does not require the absurd result reached by the Idaho Supreme Court that the handicapped child be placed in a regular classroom even though he has no chance of advancing academically.

3. The Idaho Supreme Court has failed to recognized that the Act and Regulations require cooperation by the parents of the handicapped child in evaluating and developing an appropriate program for the handicapped child, leading to the erroneous result that parents can refuse and withhold

disclosure of pertinent education records and previous evaluations of their handicapped child, and then obtain an award for damages for the school district allegedly not offering an appropriate program.

ARGUMENT

A. Petitioner's Duty Was To Make Comparable Part B Funded Services Available, Not FAPE.

The heart of the Idaho Supreme Court's misinterpretation of the EAHCA and applicable regulations is its characterization at p. 4 of its Opinion (88 ISCR at p. 665) of the major issue being whether the Petitioner offered or failed to offer Gabriel a FAPE. (See A-2 p. 11) This apparently led the court to its egregious misinterpretation of the statute and regulations to mandate that a school district must develop and offer a FAPE to a handicapped child even though his parent has already selected a private school setting for him voluntarily, and is not

interested in a public education. (See 88 ISCR p. 673; A-2 pp. 19-20)

The Idaho court has refused to recognize in its opinion the most critical and clear distinction under the Act and regulations as to benefits and services a school district is obligated to make available to public school children (which includes children in public education which the school district has referred to a private school), as opposed to those children in private schools voluntarily placed there by their parents. Without question, the services and benefits to be provided those handicapped children in public education, whether enrolled in a public school or referred to a private school by the public agency, is to develop and make available a free appropriate public education; however, where the parents have already chosen to enroll the handicapped

child in a private school of their own choosing, and are not interested in a public education, then a program must be developed which makes available to that handicapped child "equitable opportunities to participate in services and benefits comparable to those provided public school children with Part B funds granted to the agency under the Act".

The Petitioner recognizes that the court's decision necessarily involved what has been described by the 3rd Circuit Court of Appeals as an interpretation "of a complex web of federal and state statutes and regulations." Geis v. Board of Education of Parsippany-Troy Hills, Morris County, 1985-86 EHLR 557:135 at p. 136; 774 F.2d 575 (3rd Cir. 1985). In Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986) at pp. 1495-1496, the 9th Court of Appeals commented:

> "Our examination of the EACHA and its regulations has left us with the firm conviction that the federal law respecting the educational rights of handicapped children is not a model of clarity. As we have indicated, the issues are exquisitely difficult. Their avoidance by congress and administrators is understandable. Courts, however, must confront those questions fairly presented to them."

Despite the complexity of the statute and regulations, however, once a basic comprehension of the same is acquired, the issue pertinent to the resolution of this dispute is rather simple: Public school children, whether they are enrolled in public schools or private schools by the school district, are entitled to a FAPE; handicapped children enrolled voluntarily in a private school by their parents are <u>not</u> entitled to a FAPE but they are entitled to an IEP which makes available to them equitable opportunities to participate in comparable EACHA funded services.

The pertinent regulations are set forth

in Subpart D dealing with private schools, are set forth in 34 CFR §300.400-300.452. The importance of the regulatory distinction between children in private schools referred by public agencies as opposed to those not referred by pubic agencies is emphasized by the capitalized heading immediately preceding the initial regulation in each of the two categories. Immediately preceding regulation §300.401 is the following:

> "HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES
>
> §300.400 Applicability of §§ 300.401-300.403
>
> Sections 300.401-300.403 apply only to handicapped children who are or who have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services."

Immediately following §30.403 the regulations dealing with parent-referred private school children provide as follows:

"HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

§300.450 Definition of "private school handicapped children"

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§300.400-300.402."

§300.452 states that local education agencies must provide special education and related services to private school children. The scope of a local education agency's responsibilities as a sub-grantee under the Act is established by §300.451(b), which in turn provides that the requirements of 34 CFR §§76.651-76.663 of EDGAR be met. §76.651 of the EDGAR regulations provides as follows:

"Responsibility of a state and a sub-grantee.

(a)(1) a sub-grantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with requirements in §§76.652-76.662

and in the authorizing statue and implementing regulations for a program." (emphasis added)

The above regulation has been consistently and uniformly interpreted to mean that when dealing with a handicapped child referred to a private school by his parents and not by a public agency, the subgrantee is not required to provide a free FAPE to that child, but rather, as Petitioner has contended throughout this litigation, to provide a "genuine opportunity for equitable participation in EACHA funded services."

The EAHA statutory scheme has established the federal Office of Special Education Programs (OSEP) to be the principal agency in the United States Department of Education for administering and carrying out the EACHA. See 20 USC §1402(a). OSEP routinely issues rulings and policy letters clarifying the United States Department of

Education's positions on issues arising under the EACHA. Contrary to the ruling of the Idaho Supreme Court that a school district is obligated to develop and make available a FAPE to a private school child voluntarily enrolled by his parent, all of the national policy statements and letters of interpretations issued by OSEP have recognized that such children need only be provided equitable opportunities to participate in comparable benefits.

An EACHA ruling/policy letter issued by OSEP on September 29, 1986 and reported at EHLR 211:414 provides in pertinent part as follows at page 414:

> "The EHA-B establishes two categories of private school handicapped children: (1) those who are placed in private schools by a public agency ass a means of providing them a free appropriate public education (FAPE), and (2) those who are enrolled by their parents in private schools. Your questions, in this letter, are concerned with children in the second category.

> Handicapped children enrolled by their parents in a private school are not entitled to FAPE or to have the cost of their entire placement paid for by a public agency. However, under Section 613(a)(4)(A) of the Act, State educational agencies must insure that, to the extent consistent with the number and location of handicapped children enrolled in private elementary and secondary schools throughout the State, provision is made for the participation of such children in the program assisted or carried out under the Act by providing them with special education and related services." (emphasis added)

In another policy letter issued by OSEP on December 13, 1983, and reported at EHLR 211:294, it is stated as follows at page 294:

> At the outset, it is necessary to distinguish the scope of services provided under Part B to handicapped children who are voluntarily enrolled in private schools by their parents, as compared to the services which must be made available to handicapped children who are referred to or placed in private schools by a public agency. The latter group are entitled to a "free appropriate public education," which education may be funded from any source - Federal, State, local or private - as long as there is no cost

to the parent.. See 34 CFR 300.301. In the case of Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), the provision of a free appropriate public education to the plaintiff was in issue. Similarly, DAS Bulletin #26 and the policy letters you cited have no bearing on the services provided to children to whom a free appropriate public education has been offered and whose parents choose to place the child in a private school. See 34 CFR 300.403(a). For those children, the EHA requirements in 34 CFR 300.450-300.452 and the EDGAR provisions at 34 CFR 76.651-76.662 apply. (emphasis added)

In a letter written in November, 1983, to the Wyoming Department of Education, the acting director for the Division of Assisttance to States of the United States Department of Education similarly interpreted the above statutes as follows:

> "While local school districts are not required to provide a free appropriate public education (FAPE) to handicapped children placed in private schools by their parents, LEAs are required to (1) have FAPE available to these children should they return to public school, and (2) provide these children with an opportunity to participate in programs funded under EHA-B.

* * *

> Any special education or related services provided to these children must be done in accordance with an individualized education program (IEP) developed in conjunction with the private school. The IEP would be limited in scope to cover only the limited services to be offered by the LEA." (emphasis added) (See A-8)

In a policy interpretation issued February 20, 1981, the Federal Department of Education similarly has interpreted these regulations as follows at EHLR 211:263:

> "Second, while local school districts are not required to provide a free appropriate public education (FAPE) to handicapped children placed in private schools by their parents, they are required to (1) have FAPE available to these children should they return to public school, and (2) provide these children with an opportunity to participate in programs funded under the Education of the Handicapped Act, Part B...." (emphasis added)

The above interpretation was followed in a policy letter issued by OSEP on May 1, 1980, reported at EHLR 211:280 at page 281 as follows:

"According to these requirements, the State or local agency is not required to provide a FAPE to a handicapped student placed in a private school by his or her parents. However, §613(a)(4)(A) of the statute requires that the State provide for "participation of such children" in the State's Part B program by providing special education and related services consistent with the number and location of those children in the State." (emphasis added)

A similar policy statement was issued by the Bureau of Education for the Handicapped on March 19, 1979, reported at EHLR 211:110, the Digest of Response providing in pertinent part as follows at page 110.

"Although children placed in non-public schools by their parents have the right to some benefits under P.L. 94-142, these benefits can be limited because of the parents' decision to refuse FAPE offered by LEA.

* * *

Parents' voluntary placement of child in non-public school which is not least restrictive environment does not violate least restrictive environment provision."

As can be seen from the above, neither the U.S. Department of Education, OSEP, nor

as far as counsel's legal research can determine, has any court ruled that a local education agency must make available or offer a FAPE to a handicapped child voluntarily enrolled in a private school by his parents. The Idaho Supreme Court was clearly wrong, therefore, in characterizing the issue in this case as to whether the Petitioner school district had offered a FAPE to Gabriel, because Gabriel's parent had already enrolled him unilaterally in a private school. The Petitioner school district had no obligation to offer a FAPE. Its obligation, which it met, was to make available equitable opportunities to participate in comparable EACHA funded benefits being provided by Petitioner to its public school children.

Where the parents indicate to a school district that they intend to enroll their child in a private education, there is

clearly no requirement for the district to develop or offer a free appropriate public education. Cain v. Yukon Public School, 775 F.2d 15 (10th Cir. 1985). Thus, when the parents initiate or maintain their child at a private school, the school district is not obligated to recommend an alternative placement each year. See 1982 EHLR p. 504:178. Parents seeking to trigger the procedural requirements of the Act (regarding placement) must make it clear to the district that they want to initiate a change in placement and enroll their child in public education. Evans v. District No. 17 of Douglas County, Nebraska, 841 F.2d 824 (8th Cir. 1988). In Evans, the court stated in pertinent part at p. 829:

> "Nonetheless, we agree with the district court that the parents' expressions of concern were not enough to trigger the procedural requirements of the Act. The evidence is that they neither formally or informally asked Millard to make a change in Christine's placement.

* * *

> "While we do not believe that parents need to formally request a school district for a change in placement, the parents must make clear to the district that they want the school district 'to initiate' the change."

At page 831 the Evans court further stated:

> "The difficulty in this case is that in the spring of 1985 the school officials were never given the opportunity to make (or refuse to make) changes because the parents unilaterally removed their child from the school district."

The Idaho Supreme Court's ruling that a free appropriate public education must be offered to handicapped children who have been voluntarily enrolled in private schools by their parents, is not only an egregious misinterpretation of the express provisions of the EACHA and its regulations, but contrary to all precedent, both judicial and administrative. The Idaho Supreme Court's mandate of such a burdensome and affirmative obligation on the local school districts of

this state poses a clear and serious threat to the efficient use of limited federal funds in providing special education benefits to all handicapped children. Petitioner strongly urges the Court to grant Petitioner's writ, and to reverse this erroneous legal precedent which imposes a serious burden in educating all handicapped children in Idaho.

B. Mainstream Preference - Doesn't Require Warehousing Retarded Children in Regular Classrooms.

The Idaho Supreme Court's Opinion in effect requires that Idaho school districts warehouse children in regular classrooms even though they are handicapped to such a degree that they have no hope of receiving passing marks or advancing from grade to grade. The additional and significant costs of providing a one-to-one classroom aide to that child upon request of his parents of course dilutes the limited resources

available to educate all handicapped children. Such warehousing was never contemplated or even envisioned by the provisions of the EACHA. The Idaho court has completely ignored the fact that the statute requires mainstreaming only to the extent "appropriate." In this case it was not. The test of an appropriate education program when a child is placed in a regular classroom is that he receive "educational benefit", which has been translated by this court to mean, in a regular classroom setting, that the child receive passing marks and advance from grade to grade. Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 US 1976, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

The "mainstreaming", or "least restrictive environment" requirement originates from 20 USC §1401(19)(C) which requires that

an individual education program contain a statement of the extent to which the handicapped child will be able to participate in regular educational programs, in regular educational programs, and 34 CFR §300.550 (b)(1) which provides:

> "Each public agency shall insure:
>
> "(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped..." (emphasis added)

The key phrase in the regulation and to the dispute in this case are the words "to the maximum extent appropriate." In other words, the statutory and regulatory preference for mainstreaming is that a child be educated only to the extent that such is appropriate. Clearly, placing a handicapped child in a regular classroom who is so retarded that he cannot receive passing marks or advance from grade to grade, even with supplementary aides, is not appropriate.

In such a case, and under the Rowley standard, supra, the child is not receiving "educational benefit" in the regular classroom, and the child is therefore not in the least restrictive environment. Significantly, this Court's previous ruling in Rowley is that the measure of educational benefit in a regular classroom setting is defined as achieving "passing marks and advancing from grade to grade." See for example 12 Ed.Law Rptr., 212, commentary, post Rowley: Direction from courts regarding an "appropriate" education, at page 218. The statutes and regulations create a preference that handicapped children be educated with non-handicapped children only to the "maximum extent appropriate". Roncker v. Walters, 700 F.2d 1058 (CA Ohio 1983), cert. denied 104 S.Ct. 1986, 464 US 864, 78 L.Ed.2d 171. When considering whether mainstreaming is

"appropriate" where a regular classroom is involved, the term "appropriate" in this context refers to mainstreaming to the extent which will enable a child to receive "adequate educational benefit". In Re Hershey Public School District No.37, 3 EHLR 504:255 (Sept. 8, 1982) analyzes the Rowley standard of "appropriateness" as it pertains to mainstreaming and states at page 504:227:

> "Such instruction services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act, and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (emphasis added)

Also see Quackenbush v. Johnson City School District, 716 F.2d 141 (2nd Cir. 1983) at p. 147 where the court states that:

"...if the child is being educated in the regular classrooms of the public education system, the [IEP] should be reasonably calculated to enable a child to achieve passing marks and advance from grade to grade." Also see Board of Education of East Windsor Regional School v. Diamond, 808 F.2d 987 (3rd Cir. 1986) at p. 991:

> "For disabled children to attend regular classrooms in the public education system, as was the child in Rowley, the individualized plan 'should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." Id. at 204, 102 S.Ct. at 3049.
>
> "Andrew Diamond never had been able to attend classes in regular classrooms. Thus the Rowley standard of enabling one to achieve passing marks and advancing from grade to grade probably is not achievable for Andrew."

It is obvious that the Act never contemplated placing children in regular classes who are so retarded that they have no hope of achieving passing marks or advancing from grade to grade.

At the administrative hearing, the Petitioner school district provided the testimony of six expert witnesses in the special education field, including two Ph.D.'s, a special education consultant with a masters degree in special education, and other certified specialists, who all expressed their professional opinion that mainstreaming Gabriel to the extent that he be placed in a regular classroom, was totally inappropriate. The Idaho Supreme Court, somehow, ignored the testimony of these six witnesses, (which was expressly described in detail, witness by witness, in Petitioner's Brief in support of its Petition for Rehearing) and found that the Petitioner offered no evidence to rebut the court's conclusion that Gabriel's placement in a regular classroom was appropriate.

OSEP has recently expressed its policy on the requirement that handicapped children

be educated with non-handicapped children. In a 1988 response to a Pennsylvania inquiry published in the Education for Handicapped Law Report, OSEP stated:

> "The Department takes the position that mildly handicapped children can and should be educated in the regular classroom with proper supports. The Department recognizes that some handicapped children cannot be educated appropriately in a regular classroom. In some individual cases, placement in a separate environment has been recognized as the least restrictive environment for a child. Inherent in a free appropriate public education is a continuum of services, including separate public and private facilities. If a handicapped child is removed from the regular educational environment, such removal must not be based upon the (1) category of handicapping condition, (2) configuration of the service delivery system, (3) availability of educational or of related services, (4) availability of space, or (5) curriculum content or method of service delivery. Placement in the least restrictive environment must always be based on the child's IEP." (emphasis added) EHLR 213:124 (March, 1988)

Thus, it is clear that the Act prefers educating handicapped children with non-handicapped children, where the same is

appropriate. Clearly, the same is not appropriate where the handicapping condition is so severe that education in a regular classroom with support services cannot result in the handicapped child receiving passing marks and advancing from grade to grade. In this case, Gabriel, with an I.Q. of 37, a language capability of two to three word utterances, had no possibility of receiving passing marks. It was way past the "maximum amount of appropriateness"to place him in a regular classroom. All of the Petitioner school district's expert witnesses so testified. The Idaho Supreme Court was clearly wrong in its ruling on this issue, and has created a dangerous precedent under federal law in the state of Idaho which will severely hamper the efficient use of federal funds to educate all handicapped children in this state. For this reason too, the writ requested by

Petitioner should be granted.

C. PARENTAL FAILURE TO COOPERATE

The problem the Petitioner school district officials were faced with in this case, even assuming the education program they proposed was inappropriate (which they do not), was that the handicapped child's parent obstructed and in effect prevented officials from obtaining critical and necessary information from which to develop such a program. As mentioned previously, at the time of the first Child Study Team meeting on August 29, 1983, prior to the start of the school year, Gabriel's parent had ignored and refused to comply with a number of written requests from Petitioner school district officials for Gabriel's education records from the previous schools he attended in another school district. These records were not available to Petitioner's officials and were necessary to

their evaluation of Gabriel's level of functioning. Also crucial, was the fact that Gabriel's parent refused to permit school district officials to conduct a multi-disciplinary comprehensive assessment of Gabriel's mental and physical functioning levels, which would provide information critical to developing an appropriate education program, either at his private school, or should public enrollment be solicited. An evaluation was eventually obtained by Gabriel's parent, but this was an independent evaluation by an evaluator of the parent's own choosing, and one not certified under applicable regulations to conduct a comprehensive evaluation for school district purposes. This evaluation, such as it was, was not even provided officials until a day or two before the second Child Study Team meeting on November 15, 1983. This was several months after the

school year had already started.

Despite this, the District Court and the Supreme Court of Idaho ruled that Petitioner school district was liable in damages for its alleged failure in not developing an appropriate program. This again has established a dangerous precedent in the State of Idaho, which threatens the efficient use of limited state and federal funds for the education of all handicapped children.

The EACHA envisions cooperation between the parents and school district officials in discussing and negotiating appropriate placements. By her unilateral placement of Gabriel at the private school, refusing to allow a multi-disciplinary comprehensive assessment of Gabriel by a qualified evaluator to acquire up-to-date evaluative data, and her failure to provide education records from the other school district,

Gabriel's parent seriously hampered school district official's efforts in developing an appropriate program for Gabriel. Before a school system is responsible under the EACHA for special placement of a student it is entitled to up-to-date evaluative data. Dubois v. Connecticut State Board of Education, 727 F.2d 44 (CA Conn. 1984).

By requiring that participants in the Child Study Team meetings involve both local education agency officials, private school officials, and the parents, if they wish to participate, the regulations envision a cooperative approach to development of the child's education program. The parents, of course, are free to cooperate or not to participate in the process. However, if they obstruct or hinder the process by failing to provide records or consenting to an evaluation, they should not be heard to complain of an alleged inappropriateness of

a program developed from the climate of their disruptive behavior.

For this reason too, the Petitioner's request for a writ should be granted, and the Idaho Supreme Court Opinion reversed.

CONCLUSION

Under the EACHA and federal regulations, local education districts should not be required, as the Idaho Supreme Court has required the Petitioner, to develop and offer a FAPE to handicapped children who have been voluntarily placed in private schools by their parents and are not seeking public enrollment. They are entitled to equitable participation in comparable Part B funded benefits, and Gabriel was given such an opportunity in this case.

Under the EACHA and federal regulations, handicapped children who are so retarded that they have no hope of achieving

passing marks and advancing from grade to grade in a regular classroom, even with all support services requested, should not be placed there. It is not appropriate to place a child so severely handicapped in a regular academic classroom that he cannot advance academically. Nor should a local education agency have to incur the significantly increased cost of the support services, such as a one-to-one full-time aide, in these situations. The Act clearly did not contemplate the warehousing of mentally retarded children in this fashion, and the Idaho Supreme Court Opinion which mandates this terrible result should be reversed by this Court.

The EACHA and federal regulations promulgated thereunder envision cooperation between the parents and school district officials in formulating an education plan for a handicapped child. A local education

agency should not be held liable in damages, as the Idaho Supreme Court has done in this case, where the parents have refused to cooperate and even obstructed school district officials' efforts to obtain up-to-date evaluative material. Forcing a local education agency to develop a plan in absence of up-to-date evaluative data, and holding that agency liable in damages for any deficiencies in its program developed therefrom, was not contemplated by the Act, and seriously threatens the ability of local education agencies to efficiently educate all handicapped children with its limited resources.

For the reasons set forth above, Petitioner's request for a writ of certiorari should be granted.

DATED This 24th day of March, 1989.

Respectfully submitted,

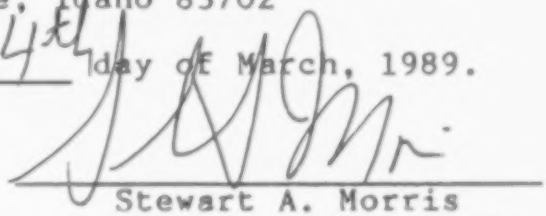
Stewart A. Morris
Attorney for Petitioner

PROOF OF SERVICE

I, Stewart A. Morris, a member of the Bar of the United States Supreme Court, representing the Petitioner on whose behalf service of the foregoing document has been made, hereby certify that all parties required to be served have been served in compliance with Supreme Court Rule 28.3, by depositing a copy of the foregoing document in the United States Post Office, First Class, postage prepaid, addressed to counsel of record at his post office address listed as follows:

J. Brent Marchbanks
Coalition of Advocates for the Disabled
1510 West Washington
Boise, Idaho 83702

on this 24th day of March, 1989.



Stewart A. Morris
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF IDAHO

GABRIEL THORNOCK, by his next friend and mother LANA (THORNOCK) BAUGH and LANA (THORNOCK) BAUGH, Plaintiffs-Respondents,	)	ORDER DENYING PETITION FOR REHEARING
v.	)	
BOISE INDEPENDENT SCHOOL DISTRICT #1, Defendant-Appellant.	)	

The Appellant having filed a PETITION FOR REHEARING on July 22, 1988 and supporting BRIEF on August 25, 1988 of the Court's Opinion released July 1, 1988; the Court having reviewed the Amicus Curiae Brief in support of the PETITION FOR REHEARING filed November 4, 1988; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is,

DENIED.

DATED This 29th day of December, 1988.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge D. Duff McKee
West Publishing Co.
Mead Data Central

Vol. 88, No. 61

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 16455

GABRIEL THORNOCK, by his next friend and mother LANA (THORNOCK) BAUGH and LANA (THORNOCK) Baugh, Plaintiffs-Respondents, vs. BOISE INDEPENDENT SCHOOL DISTRICT #1, Defendant-Appellant.	)	Boise May 1988 Term Filed: July 1, 1988 F.C.LYON

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. Honorable J. Ray Durtschi and Honorable D. Duff McKee, District Judges.

Appeal from decision requiring school district to reimburse Thornock for tuition and costs for attending private parochial school under Education for All Handicapped Children Act. Affirmed.

Stewart A. Morris, Boise, Idaho, Attorney for appellant.

J. Brent Marchbanks, CO-AD, Inc., Boise, Idaho attorney for respondents.

HUNTLY, J.

This case presents three issues: (1) whether the district court employed the appropriate standard of review for an administrative proceeding under the Education for all Handicapped Children Act (EAHCA); (2) whether the Boise Independent School District fulfilled its legal obligation to offer Thornock a Free Appropriate Public Education (FAPE); (3) whether the school district's duty to provide a FAPE is obviated because of Thornock's parent's selection of private school placement for their son.

Gabriel Thornock, a multiply handicapped child, is the son of Lana Baugh and has been classified as "trainable mentally retarded." During the 1981-92 school year, Gabriel resided in the Meridian School District, where he was placed in the public school's "contained classroom," a class consisting solely of handicapped children

taught by special education teachers. Gabriel's parents decided to place him in a private school to better attain social integration and achievement goals. All of the private schools contacted by his parents required that he have the assistance of a full time one-to-one aide. They enrolled him in St. Joseph's parochial school in the Boise School District for the 1982-83 school year.

Once Gabriel was enrolled in a private school, his parents started administrative proceedings to obtain reimbursement for the one-to-one aide.

Since Gabriel's legal residence was still in the Meridian School District, Meridian contracted with the Boise School District to provide special education services. In June, 1983, the Thornocks changed their residence to the Boise School District. Gabriel's parents requested the Boise School District to provide special

education related services including publicly funded services of a full time one-to-one aide.

On August 29, 1983, a Child Study Team (CST) meeting was convened to develop a program of special education related services and discuss the financial responsibility for the full time one-to-one aide.

The Boise Independent School District had been advised by its legal counsel that it was not financially responsible for the services of a full time one-to-one aide provided in a private school setting. On November 15, 1983, the Child Study Team meeting reconvened, meeting with Gabriel's parents to inform them of opportunities available to Gabriel through the public education system. The district made no offer to consider any placement other than in a segregated classroom for "special education" children. Gabriel's parents

contended that he was entitled to receive "mainstreaming" under federal statute, that is, placement in a classroom with non-handicapped children. The district offered to pay for related services in a private school, but would not pay for the full time one-to-one aide. However, Gabriel's parents chose to keep him in the private school setting and initiated administrative proceedings in which they sought reimbursement for the cost of the one-to-one aide and the tuition at the private school.

The hearing officer ruled in favor of the Boise Independent School District. The decision was appealed to the State Department of Education where the decision was affirmed. Gabriel next filed a petition in the district court for judicial review of the administrative decision. The district court reversed and ruled in favor of Gabriel Thornock and the district now appeals.

I.

We first address whether the district court applied the appropriate standard of review under the EAHCA.

In 20 U.S.C. §1415(e)(2), Congress states that "the court shall receive the records of the administrative proceedings, shall hear additional evidence of the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

The school district, citing Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) claims that the district court's review is not a de novo review where the decision is based on the preponderance of the evidence. Rather, the district would impose an "implied limitation" on the court's review and require "due weight" be given to the hearing officer's decision.

Rowley, supra, involved a student who was mainstreamed and received passing grades in the standard program of study. The dispute in Rowley was whether the district should be using federal money to provide the student with a deaf language interpreter. Given the court's holding that the student was receiving an appropriate education, the court understandably stated that "courts must be careful to avoid imposing their view of preferable education methods upon the states." Rowley, 458 U.S. at 207.

Unlike Rowley, the instant case does not involve a school district's choice between two appropriate educational alternatives. Rather, the question here is whether the education offered was appropriate at all. The district court did not abuse the preponderance of the evidence standard by measuring the educational policies of the school district against the

congressional requirements. The question before the district court was whether the education offered Thornock was appropriate.

Rowley required that due weight be given to the proceedings before the hearing officer. This would indicate that the evidence presented in the hearing be considered as much a part of the record as any proceeding before the district court as long as those proceedings comply with 20 U.S.C. §1415. It does not imply that the hearing officer's findings and conclusions should rise beyond whatever persuasive value they have in the district court's decision on the merits.

In Gregory K. v. Longview School Dist., 81 1 p.2d 1307(9th Cir.1987), both the standard applicable to the trial court and that applicable to the appellate court in these cases was discussed. As to the deference to be given state administrative findings, the Gregory court noted:

As the Supreme Court has held, courts must give "due weight" to judgments of education policy when they review state hearings under 20 U.S.C. §1415(e). Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3050, 73 L.Ed.2d 690 (1982). Citing Rowley, we have held that "courts should not substitute their own notions of sound educational policy for those of the school authorities which they review." Wilson v. Marana Unified School Dist., 735 F.2d 1178, 1183 (9th Cir. 1984). How much deference to give state educational agencies, however, is a matter for the discretion of the courts:

> The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.

Town of Burlington v. Dept. of Ed., 736 F.2d 773, 792 (1st Cir.1984), aff'd, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

The district court in the instant case noted:

> [T]hat the school district's argument is irrelevant to the outcome of this case. The evidence in this case, unlike most cases, is clear and uncontroverted as to every relevant fact. By any standard of evidentiary review this Court's ruling would have to be the same as is herein announced.

The Boise School District put forth no evidence rebutting the substantial evidence that mainstreaming was appropriate for Gabriel.

As to this Court's standard of review, the Court in Gregory, supra, commented:

> The Court of Appeals reviews the district court's findings of fact for clear error. Burlington Northern, Inc., v. Weyhaeuser Co., 719 F.2d 304, 307 (9th Cir.1983). "A finding of fact is deemed clearly erroneous when although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." Id. Even where, as here, the district court relies on a written record of administrative proceedings, the clearly erroneous standard applies to findings of fact. Id.
> The Court of Appeals reviews de novo the district court's conclusions of law. Id. Unless a mixed question of fact and law is primarily factual, we review mixed questions de novo. United States v. McConney, 728 F.2d 1985, 1199-1204 (9th Cir.) (en banc), cert.

> denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). For example, whether the school district's proposed IEP was a "free appropriate public education" as required by the Education for All Handicapped Children Act is a mixed question that we review de novo. Wilson v. Marana Unified School District, 735 F.2d 1178, 1181 (9th Cir. 1984); Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 814 n.2 (9th Cir. 1983), cert. denied, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (19985 [sic]).

The district court followed the standard of review provided in 20 U.S.C. §1415, and there is now showing that it violated the preponderance of evidence standard by finding that the education offered by the Boise School District was not appropriate.

II.

With the appellate court standard of review enunciated in Gregory, supra, in mind, we now pass on to the major issue on appeal, which is whether the district court erred in ruling that the school district failed to offer Gabriel a FAPE. The purpose

of the EACHA is to make available to all handicapped children a free appropriate public education. 20 U.S.C. §1400(c). A FAPE must be provided in the least restrictive environment, and Congress has expressed a strong preference for mainstreaming handicapped children in non-handicapped educational settings. 20 U.S.C.§1412 (5)(B). Above all else, though, Congress recognized that handicapped children are unique and that placement decisions must be made on an individual basis, by a multi-disciplinary team, according to a variety of criteria, not according solely to I.Q. or some other criterion. See 20 U.S.C. §1412(5)(c) and 34 C.F.R. §300.532. The critical feature of any FAPE is that it must be in conformity with a handicapped child's "individual education program" (IEP). See 20 U.S.C. §1401(18) (FAPE defined in terms of conformity with IEP).

The importance of the IEP cannot be

understated. It is the decision-making document. Accordingly, an IEP must be in effect before special education and related services are provided to a child, and it must be implemented as soon as possible following the child study team meeting. 34 C.F.R. 300.342(b). See also, 34 C.F.R. §300.342-300.345 and IDAPA 08.02.E.15,3.e, which explain the child study team. Further, the EACHA mandates that each local educational agency "will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year.. ."20 U.S.P. [sic] §1414(a)(5) (emphasis added).

Just what, then, must a valid IEP contain? The EACHA provides the answer:

> "The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of

handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such ~~child~~, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved."

20 U.S.C. §1401(19) (emphasis added). See also 34 C.F.R. §§300-340-300.349; and IDAPA 08.02.E.15, 3.h and i.

Presumably to assure compliance with the least restrictive environment requirement, the EAHCA and the federal regulations require that the IEP contain a statement of the extent to which the child will be able to participate in regular educational programs. See citations above. The Idaho regulations require, inter alia, a statement of:

> "the extent to which the student will participate in the regular education program and assurance by the Child Study Team that all educational alternatives have been considered and that any special education and related services to be provided for the child will be in the least restrictive environment." IDAPA 08.02.E.15, 3.h.v.(d).

The EAHCA makes clear that the fundamental prerequisite of any FAPE is a sufficient IEP. 20 U.S.C. §1401(18). The legislative history and the commentators all indicate that the procedural aspects of the EAHCA are just as important as its substantive provisions, so the concern regarding the timing and the sufficiency of Gabriel's IEP is not mere quibbling.

The dispute between Gabriel's parents and the school district centers upon the extent to which mainstreaming is appropriate and feasible for Gabriel. In August of 1983, Gabriel's parents initiated discussions with the school district to have one-to-one services provided in a regular

classroom. The hearing officer found that from the outset Gabriel's parents were committed to placement in St. Joseph's and that "[f]rom the outset, the district objected to public funding of the one-to-one individual aide for Gabriel in private placement." See Hearing Officer's "Findings, Conclusions, and Decision," pp. 9-10. Various letters in the record indicate that, though Gabriel's parents authorized the release of information concerning Gabriel to the school district for evaluation, no sufficient IEP was in effect for Gabriel at the beginning of the 1983-1984 school year.

A purported IEP was prepared by the school district on August 29, 1983, and another on November 11, 1983. Both documents suggest that the proper FAPE for Gabriel is physical and occupational therapy, and communication disorder services. However, neither documents set forth goals, objectives and "appropriate objective

criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved" as required by 20 U.S.C. §1401(19). Nor do they contain a statement of the extent to which Gabriel "will be able to participate in regular educational programs," 20 U.S.C. §1401 (19)(C) (emphasis added).[1] The necessity of this latter statement is made clear by 34 C.F.R. §300.550(b):

> "Each public agency shall insure:
> "(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and
> (2) That special classes, separate schooling or other removal of handicapped children from the regular

[1] The Idaho regulations only require a statement of the extent to which the child "will participate," not the extent to which the child "will be able to participate" in regular educational programs. IDAPA 08.02.E.15, 3.h.v.(d). In this regard, the Idaho regulations are contrary to the EAHCA, and the mandate of the EAHCA must control.

> educational environment occurs only when the nature or severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieves satisfactorily."

A mere conclusory statement that the child study team has selected the least restrictive environment is not enough. There must be a statement describing the handicapped child's ability or inability to participate in regular educational programs.

We do not hold that a new IEP must be prepared for each school year. But here, the District utterly failed to tender any appropriate IEP for Gabriel.

In a letter to the District dated November 21, 1983, Gabriel's mother and attorney correctly informed the District that the District's latest offer of placement was not the "least restrictive" that would be "appropriate," and to initiate the due process hearing procedures to which

they were entitled. At this point, the District was certainly obligated to tender a valid IEP. However, counsel for the District admits that, by that point, the District felt it owed no further obligation to the Thornocks. The District seemed to be operating from the erroneous premise that, regardless of the express mandate of 20 U.S.C. §1412(5), in any given situation, the offering of an education for which the District at least partially paid (i.e. providing "comparable" Part B funded services) was all that was required of it. The District was not alone in its confusion, as the hearing officer also erroneously concluded that:

> Under the provisions of the Act and the regulations applicable to this case, Boise School District is not obligated to provide to Petitioner a free appropriate public education. Rather, the District is required to provide an opportunity for equitable participation in Part B funded program benefits consistent with the number of eligible private school students and their needs.

(Hearing Officer's "Findings, Conclusions, and Decision," p. 13).

Because of the flaws in Gabriel's "IEPs," the district's failure to acknowledge the deficiencies of the IEPs it promulgated, its failure to develop an adequate IEP after receiving notice of its noncompliance with the EAHCA in the letter of November 21, 1983, and the obvious flaw in the "Findings, Conclusions and Decision" of the Hearing Officer (i.e. stating that Gabriel was not owed a Free Appropriate Public Education), we affirm the decision of the district court. Without a valid IEP there can be no FAPE, see 20 U.S.C. §1401 (18), and therefore 34 C.F.R. §300.403(a)[2] indicates that reimbursement is appropriate.

While our holding that no adequate IEP

---

[2] 34 C.F.R. §300.403(a) provides:

"If a handicapped child has available a free appropriate public education and the parents choose to place the child in a

(continued...)

was prepared obviates the need to address the proper definition of "appropriate education," we would like to provide some guidance in this area. 20 U.S.C. §1412(5) requires all states to establish the following:

> Eligibility requirements
>
> . . . .
>
> (5) The state has established (a) procedural safeguards as required by §1415 to this title, (b) procedures to assure that, to the maximum extent appropriate, handicapped children, including children of public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicapped is such that education in a regular class with the use of supplementary aides and services cannot be achieved satisfactorily,...
> (Emphasis added).

2 (...continued) private school or facility, the public agency is not required by this part to pay for the child's educa- ation at the private school or facility. ..."
34 C.F.R. §300.403(a)

There is some confusion in applying the above section since the EAHCA covers all types of handicaps.[3] The school district interpreted §1412(5) to apply only to physical handicaps. The school district bases its interpretation of the section on Rowley, supra, which referred to regular examination and yearly advancement from grade to grade as a factor to consider in determining whether the education being provided was appropriate. The school district concluded that Rowley meant that mainstreaming is only appropriate when the handicapped child can progress from grade to grade. However, the Supreme Court in Rowley confined its analysis to the factual setting of that specific case. To apply the school

[3] 20 U.S.C. §1401(1) provides the definition for "handicapped children": (1) the term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually
(continued...)

district's interpretation of Rowley would deprive most mentally handicapped students of the benefits of mainstreaming. The district court herein interpreted Rowley to mean, and we agree, that when a physically handicapped student is participating in a regular curriculum, is being educated with non-handicapped students, and is achieving passing grades, a strong presumption is made that the education provided is appropriate. Rowley, 458 U.S. at 202-204, 102 S.Ct. at 3049.

In adopting the EAHCA, Congress did not distinguish between physically and mentally handicapped. In addition, Congress has indicated a strong preference for main-

---

3 (...continued) handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disability, who by reason thereof require special education and related services.

streaming all handicapped children.[4] Indeed, the language in 20 U.S.C. §1415 indicates more than a mere preference for mainstreaming--but requires it "to the maximum extent appropriate." In Wilson v. Marana Unified School Dist. of Pine County, 735 F.2d 1178 (9th Cir. 1984), the Ninth Circuit further interpreted the federal mandate to "mainstreaming to the maximum extent possible" as an important "policy which must be balanced with the primary objective of providing handicapped children with an "appropriate education." Id. at 1183. (Emphasis added). Therefore, "mainstreaming is a major and important factor to be balanced in assessing an appropriate placement. Other factors of course include the child's emotional and

[4] Senator Harrison Williams of New Jersey, a principal Sponsor of the Act, emphasized the need for the education of all handicapped children:

(continued...)

intellectual makeup.

With his definition of an "appropriate education" as a foundation, we would also like to comment on the testimony presented at the evidentiary hearing by Boise School District.

The school district argued that its segregated education was appropriate--an argument that is entirely irrelevant and superfluous to any discussion of the real issue in this case. The school district, in accepting federal funds provided under the EACHA, has legally obligated itself to accept mainstreamirg, "to the maximum extent

---

[4] (...continued) While much progress had been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. (Emphasis added). The most recent statistics provided by the Bureau of Education for the handicapped estimate that... 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education. 121 Cong. Rec. 19486 (1975).

appropriate," as a requirement of an appropriate education. In Campbell v. Talledega County Board of Education, 518 F.Supp. 47 (Ala. 1981), the court noted that although the school district questioned the soundness of the mainstreaming approach to the education of the handicapped, by accepting federal funds, "the state of Alabama has bound itself to act in accordance with that philosophy." Id. at 55. In Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), the court stated: The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the act's mandate. Id. at 1063. By arguing that its segregated education is appropriate for Gabriel, the Boise School District has ignored what the Alabama

Supreme Court and 6th Circuit recognized. Such arguments express only a basic disagreement with the Congressional intent that mainstreaming, to the maximum extent is appropriate, is preferable to an appropriate segregated education.[5]

III.

We next address the issue of whether the school district's duty to provide a Free Appropriate Public Education is obviated by the selection of a private school by Gabriel's parents. The Thornocks moved to the Boise Public School District weeks before the 1983-84 school year started and Gabriel had been enrolled in St.

---

[5] Although not necessarily to our ruling in this case, we would like to comment on the district court ruling that one-to-one aide service was a necessary part of an appropriate education in Gabriel's case.

The evidence showed that Gabriel had been mainstreamed with the help of a full-time, one-to-one, teacher's aide. The school

(continued...)

Joseph's School prior to the move. As the trial court noted, it would not have been reasonable to require them to abandon his placement at St. Joseph's School without an offer of an appropriate education elsewhere. 20 U.S.C. §1415(3)(3) states that during the IEP review process "the child shall remain in the then current educational placement...."

Congressional preference for continuity in placement, and the failure of the school district to offer Gabriel an appropriate education, gave his parents justification to maintain the St. Joseph's placement without waiving his right to a Free Appropriate Public Education. It seems that a significant consideration behind the hearing

---

5 (...continued) district did not attempt to combat the evidence that a full-time aide is necessary for mainstreaming, but rather it argued that it could not provide aide services with Part B funds because the district aides are paid through separate local funds.

(continued...)

officer's decision was the fact that Gabriel's parents had unilaterally placed Gabriel in St. Joseph's, and that regardless of the educational program offered by the school district, it appeared Gabriel's parents would choose to keep Gabriel in St. Joseph's. Because of this, it seems the hearing officer and the school district might have believed the obligation of the school district to develop an IEP and provide a FAPE was somehow lessened. We would like to dispel any such notion.

The EACHA vests the state educational agency with responsibility for carrying out its mandated:

---

[5] (...continued) Mainstreaming is a major and important factor in assessing an appropriate education. Related services which make mainstreaming possible should take priority over other related services. The school district is correct in stating that Part B funds must supplement and not supplant locally funded programs, but there is nothing in the Act which precludes the use of Part B funds for aide services above
(continued...)

> "The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet educational standards of the State educational agency."
>
> 20 U.S.C. §1412(6) (emphasis added).

A California court in Nevada County Office of Educ. v. Super. of Pub. Instructions, 197 Cal.Rptr. 152, 158 (CAl. Ct. App. 1983), explains further:

> "The intent of establishing a single line of responsibility is clear. Referring to the rule that the state education agency must bear ultimate responsibility, the comment to the EACHA states, 'The Committee considers

---

5 (...continued) those already provided by the school district. The Act states that Part B funds are to be used to provide additional services to handicapped children starting with the basic provision of a Free Appropriate Public Education.

Therefore, Part B funds may be used for aide services and must be used for aide services when they are necessary to the successful accomplishment of appropriate mainstreaming.

> the establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. ... the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.'(Sen. Rep. No. 94-168, 1st Sess., p. 24 (1975); 1975 U.S. Code Cong. & Admin. News, at p. 1448.)"

The school district cannot abdicate its vital role merely because Gabriel is enrolled in a private school. The EACHA requires the state to develop a plan setting policies to assure that "all children residing in the state who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated. .. ." 20 U.S.C. §1412(2)(C) (emphasis

added). Even if a child is placed in a private school unilaterally by his or her parents, the state educational agency must ensure that the IEP is developed and implemented for the child if the child "[i]s enrolled in a parochial or other private school and receives special education or related services from a public agency." 34 C.F.R. §300.341(b)(2).[6]

Here, Gabriel was receiving special education from the school district while attending St. Joseph's, and therefore, the school district was required to develop or revise Gabriel's IEP and take steps to implement it. The responsibility rested

[6] The regulations also provide that after a child is placed in a private school, the public agency may permit the private school to initiate and conduct meetings to review and revise the child's IEP. 34 C.F.R. §300.347(b)(1). However, a representative of the public agency must be involved in any decision concerning the child's IEP and
(continued...)

with the district, not St. Joseph's or Gabriel's parents.

The school district has an affirmative obligation to offer a Free Appropriate Public Education. If the burden were placed on the parents of handicapped children to solicit appropriate educational offers from the district, it would be possible for two handicapped children in identical circumstances to be given opposing benefits, the difference between the two being the willingness of one parent to force the school district to make an offer and the other parents' unwillingness to pursue such a course. We cannot imagine Congress intending such an inequitable result.

The district court correctly ruled that the school district has an affirmative duty

6 (...continued) must agree to any proposed changes in the program before those changes are implemented. 34 C.F.R. §300.347(b)(2). The state educational agency is responsible ultimately for compliance with the EACHA. 34 C.F.R. §300.347(c).

to offer a Free Appropriate Public Education to all handicapped children. Hawaii Department of Education v. Catheryn D., 727 F.2d 809 (9th Cir. 1983), cert. den., 471 U.S. 1117, 105 S.Ct. 2360 (1985).

By affirming the district court, we do not mean to denigrate the expertise of the school authorities for determination as to the appropriateness of various forms of education. Courts must consider the determinations of school authorities regarding the most appropriate form of education and courts must recognize that the school authorities may validly find mainstreaming inappropriate where the educational experience would/could not be productive or enriching to the student, or where it would disrupt the classroom.

Here, however, the school district failed to prepare a valid I.E.P., the necessary precursor to an offer of a FAPE,

for the 1983-84 and 1984-85 school years. Additionally, the school district expressed a preference for its own system of segregated education, presented evidence of its efficacy and offered no rebuttal evidence regarding the appropriateness of mainstreaming for Gabriel. Having accepted federal funding under the EACHA, the district is obligated to treat "mainstreaming," "to the maximum extent appropriate," as its preference.

The final question raised by the district is whether the school district can be ordered to reimburse Gabriel's parents for their expenses, namely tuition and full-time one-to-one aide services incurred in providing him with the appropriate education the school district failed to offer him.

This question is resolved by the United States Supreme Court in Burlingon School Comm. v. Mass. Dept. of Educ., 471 U.S. 359,

370, 105 S.Ct. 1996, 2003 (1985), where the court stated that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." As the court noted, by informing parents on the one hand that they correctly placed their child in an appropriate private placement rather than accept an inappropriate public placement, but also noting that they cannot be reimbursed for their expenditures which the school district should have paid, would be to hand them a "pyrrhic victory." See also, Hudson by and through Tyree v. Wilson, 828 F.2d 1059 (4th Cir. 1987). The school district did not develop and implement a sufficient IEP. Therefore, Gabriel was not offered a FAPE and the district court properly ordered that Gabriel's parents be reimbursed. That Gabriel was unilaterally placed in a private

school by his parents did not obviate the school district's duty to develop and implement a sufficient IEP. Therefore, defendant Boise Independent School District No. 1 must reimburse plaintiffs for Gabriel's tuition at St. Joseph's School plus payments made to his one-to-one aides for the school years such benefits were denied.

The decision of the district court that Gabriel was not offered a FAPE is affirmed. The parties are hereby alerted to the fact that this decision is narrow in its scope in one respect, in that it does not preclude continued and future analysis as to the appropriate placement of Gabriel in the system in ensuing years, as the scope of this decision is limited only to the placement which was developed as a result of the proceedings in 1983. Future child study team proceedings working toward the development of a valid IEP for Gabriel would

not be prohibited by this opinion.[7]

BISTLINE and JOHNSON, J.J., concur

SHEPARD, C.J., dissenting.

The pivotal issue in this case is what is an appropriate public education" for a particular child, and who the decision maker should be--the parents, the courts, or the public school educators. In this case the parents assert, and this court agrees, that this particular child can only gain an appropriate public education by placement in a regular classroom of non-handicapped students (mainstreaming) together with a full time one-to-one aide. The court concludes that such a procedure is mandated by federal legislation and regulations, and decisions of federal courts. On the other

[7] In fact, some of the expert opinion testimony in the administrative hearing indicates that Gabriel's I.Q. and mental development is such that he cannot benefit by placement in a classroom of children of his age and that his presence in the classroom may be disruptive to the other students. The result reached in this opinion is premised upon the inadequate IEP.

(continued...)

hand, the school district maintains that because of the handicaps of this particular child, an appropriate public education may only be gained by placement in a public school which provides a special classroom environment designed for a maximum learning experience for the child, and which also provides opportunities for interaction with non-handicapped children. I disagree with and dissent from the conclusions of the majority which override and supplant the decision of the educational specialists, both at the local and the state level, as to what is an appropriate public education for this particular child.

I regret the length of this dissent,

---

[7] (...continued) The school district is not precluded from properly establishing its case in future proceedings. To do so it must comply with the conditions of the federal grants it accepts, one of those conditions being that in appropriate cases something more than a segregated classroom setting be considered and made available.

but perceive it to be necessary because the majority opinion suffers so many serious flaws. I submit that the core question--what is an appropriate public education for this particular child?---must be examined in the light of th individual child. The majority opinion furnishes no such information, but rather attempts to apply principles of law in a vacuum. Hence, it provides no guidance whatsoever for future decisions of public educators. The majority opinion either overlooks or ignores the clear case law regarding the standard of appellate review in such cases. The majority erroneously holds that no individual education program was developed for this particular child. The record speaks otherwise. The majority's muddled process is confused and confusing in failing to state whether its ultimate result is required by (1) the alleged failure to develop an individual education program (IEP), or (2)

whether reversal is required because of the failure of the school district to offer the mainstreaming educational process in accordance with the majority's perception federal requirements. The majority also erroneously concludes that the school district breached a duty mandated by federal legislation, although the parents had placed the child in a private school.

The child, Gabriel, was born in 1973 with a portion of his brain missing, and with multiple other handicaps. The family resided within the Meridian school district and prior to November 1981 Gabriel was enrolled in that district's segregated facility for children identified as having severely or profoundly handicapping conditions. In November of 1981, Gabriel was enrolled in a private preschool in Meridian. In August, 1982, at the parents' request, the Boise school district began special

education related services to Gabriel on a contract basis with the Meridian district for occupational therapy, physical therapy, and speech therapy. Testing was requested to determine Gabriel's level of functioning, and for recommendations for appropriate educational placement and planning. That report summarized previous evaluations dating back to November, 1977, as well as those tests currently administered. The then current evaluations included the Stanford Binet Intelligence Test, the Visual Motor Integration Test, Draw-A-Person, the Woodcock-Johnson Psycho-Educational Battery, and the AAMD Adaptive Behavior Scale.

Gabriel's intelligence quotient was determined to be 37. He functioned in the trainable mentally retarded category. Although his chronological age was then nine years and seven months, his mental age was three years and four months. Other tests indicated mental ages of between two and

three years. Evidence indicated that the intellectual achievement of such a child may reach as high as six years of age. Gross motor skills were functioning at a two to three-year-old level, and indicated spasticity in all extremities. His speech and language skills were at an age level between 28 and 32 months, with one and two-word utterances.

In the fall of 1982 Gabriel's parents resided in the Meridian school district, but they had decided to enroll Gabriel in a parochial school located within the Boise school district boundaries and were making tuition payments to that institution. At that institution Gabriel was placed in a regular third grade classroom but the school required the assistance of a one-to-one aide.

All of the above evaluations of Gabriel were performed under the auspices of the

Boise school district, and hence the Boise school district had an extensive knowledge of Gabriel's ability. In June, 1983, Gabriel's parents changed their residence to the Boise school district, and they request--ed the Boise district to pay the costs of special education-related services includ-ing the services of a full time one-to-one aide. A "child study team" was convened and met in August and November of 1983 with Gabriel's parents. As a result, the Boise school district offered to place Gabriel in a classroom for "special education" chil-dren. The parents contended that such proffered placement was inferior to that at the parochial school and that the district was required to place Gabriel in a "regular" classroom with the assistance of a full time one-to-one aide. The district offered to pay for special education services in the private school, but refused to pay for the

full time one-to-one aide. At no time did the parents request that Gabriel be placed in the district's public schools.

The majority errs in its focus on what the district allegedly failed to do. IEPs were in place, and it is admitted that the district had the resources for and proffered a free appropriate public education. The only question is whether the district's proffer was "appropriate" absent the "mainstreaming" demand by the parents.

Thereafter administrative proceedings were instituted wherein the parents sought reimbursement for the tuition at the private school and the cost of the one-to-one aide. In such administrative proceeding the hearing officer ruled in favor of the school district. The decision was appealed to the State Department of Education where the decision was affirmed. Judicial review was sought in the district court, which reversed

and ruled in favor of the parents.

Initially, it is my view that the district court erred in determining the appropriate standard of review under the Education For All Handicapped Children Act, 20 U.S.C. §140 [sic] et set. [sic] The district court stated: Rowley required that due weight be given to the proceedings before the hearing officer, not to the subsequent decision by the hearing officer." I disagree.

> Rowley required that due weight be given to the proceedings before the hearing officer, not to the subsequent decision by the hearing officer. This would indicate that the evidence presented in the hearing be considered as much a part of the record as any proceedings before the Court as long as those proceedings comply with 20 U.S.C. §1415. (Tr., P. 67).

The due weight requirement is clearly spelled out in School Board of Prince William County, Virginia v.Malone, 762 F.2d 1210, 1217, 1218 (4th Cir. 1985):

> The second issue raised by the

> School Board is whether the district court improperly gave deference to the decision of the state hearing officers. ...
>
> ...The district court...viewed the decision of the state hearing officers, reviewing the decision of the School Board pursuant to federal and state statutes and regulations, as the decision to which deference was due. ... [then quoting the language from Rowley at 102 S.Ct. 3051, the court continues] The district court properly gave due weight to the results of the state administrative proceedings. To give deference only to the decision of the School Board would render meaningless the entire process of administrative review. Roncker on Behalf of Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983), cert. denied, 464 U.S. 864, 104 S.Ct. 196 (1983). That is certainly not a result contemplated by the Act. (emphasis added).

The United States Court of Appeals, First Circuit, in Town of Burlington v. Department of Education, Commonwealth of Massachusetts, 736 F.2d 773, 781, 791-72 (1st Cir. 1984), aff'd sub nom, Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996 (1985), approached the due weight issue thus:

The appellants urge as error the district court's refusal to give any weight to the hearing officer's determination that the Town violated numerous state substantive and procedural regulations plus several federal provisions in its handling of the child's special education. ...

Because Congress intended courts to make bounded, independent decision--bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court--the question of the weight due the administrative findings of fact must be left to the discretion of the trial court. ... This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole. ...

Under the approach we have outlined, these findings by the state hearing officer must be reviewed as bearing on the federal right to an appropriate education and must receive the court's specific consideration. Further, because the hearing officer found the Town's proposed IEP invalid as a matter of state law, the district court should have circumscribed its review and accorded the state findings deference. (emphasis added).

That due weight should be given to the decision of the hearing officer, as well as to the proceedings before the officer, has also been recognized by the Appeals Court of Massachusetts in School Committee of Franklin v. Commissioner of Education, 462 N.E.2d 338, 345 (Mass.App. 1984), rev'd on other grounds, 482 N.E.2d 796 (Mass. 1985):

> ...the department's and the parents' principal remaining objection is that the judge did not give sufficient consideration to the agency record. ... The objection finds little support in the judge's careful analysis of the weight to be accorded the agency record. The judge anticipated the holding in [Rowley], reasoning that the requirement in §1415(e)(2) that "the court shall receive the records of the administrative proceedings" implies that the agency judgment be accorded weight. (emphasis added).

The ruling of the trial judge was affirmed.

In Pascagoula Municipal Separate School District v. Doe 508 So.2d 1081, 1086 (Miss. 1987), it was stated:

> The act...allows the trial judge to exercise his discretion to entertain additional evidence in reviewing the hearing officer's decision. This...

> does not authorize the witnesses at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of "additional." We are fortified in this interpretation because it structurally assists giving due weight to the administrative proceedings, as Rowley requires. (citations omitted, emphasis added).
>
> The trial court must make an independent ruling based upon preponderance of the evidence, but the act contemplates that the source of the evidence generally will be the administrative hearing record... Thus, the procedure followed by a trial court falls "something short of a trial de novo." (citations omitted).

Finally, in Gregory K. v. Longview School Dist., 311 F.2d 1307 (9th Cir. 1987), the standard applicable to both the trial court and the appellate court in these cases was discussed. As to the deference to be given state administrative findings, the Gregory court noted:

> As the Supreme Court has held, courts must give "due weight" to judgments of education policy when they review state hearings under 20 U.S.C. §1415(e). Hendrick Hundson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 206, 102 St.Ct. 3034, 3050, 73 L.Ed.2d 690 (1982).

> Citing Rowley, we have held that "courts should not substitute their own notions of sound educational policy for those of the school authorities which they review." Wilson v. Marana Unified School Dist., 735 F.2d 1178, 1183 (9th Cir. 1984). How much deference to give state educational agencies, however, is a matter for the discretion of the courts:
>
> > The traditional test of findings being binding on the court if supported by substantial evidence, or even a preponderance of the evidence, does not apply. This does not mean, however, that the findings can be ignored. The court, in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole.
>
> Town of Burlington v. Dept. of Ed., 736 F.2d 773, 792 (1st Cir. 1984), aff'd, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) (emphasis added).

The aforementioned cases clearly require that due weight be given to both the proceedings before the hearing officer as well as the subsequent decision. The dis-

trict court failed to give such due weight or consider or respond to the decision.

In refusing to consider the decision of the administrative hearing officer the following findings by the hearing officer were either ignored or not discussed:

7. By response dated August 24, 1983, Dr. Woychick confirmed that at the August 16, 1983 meeting the parents had indicated that they had re-enrolled Gabriel in St. Joseph's third grade and had begun making tuition payments to St. Joseph's School. The consistent testimony at the hearing and the documentary evidence introduced, indicate that Mrs. Baugh and her husband had decided on placement in St. Joseph's School. At no time did Mr. and Mrs. Baugh make application to the District for public school placement. In fact, the testimony of Mr. Baugh was that the family preferred and had selected a private setting with an individual aide, and would continue that placement so long as the family could afford it. Mr. Baugh stated that if the family could no longer afford private placement with an individual aide, he and Mrs. Baugh would need to consider a public setting. Mr. Baugh further testified on rebuttal that he informed the Boise District officials in the August 1983 meeting that at some future point in time the family could run out of money, and would at that point have to consider public school placement.

10. There is no dispute in this hearing as to whether or not the District can provide a free appropriate public education to Gabriel. Mr. and Mrs. Baugh conceded that they had never questioned the ability, resources, and personnel available to the District to provide free appropriate public education to Gabriel. Based on the testimony and evidence introduced at the hearing, I find that the Boise School District could provide, and that Gabriel would have available to him, were he placed in the public schools, a free appropriate public education. However, because Gabriel has been placed, by his parent and stepparent, into a private school, I find that the Boise District has not been required to, and has not been given the opportunity to provide a free appropriate public education to Gabriel.[8] Findings, Conclusions and Decision of Hearing Officer, pp. 6, 8, 9.

I submit that when the district court failed to consider and address the findings of the hearing officer, it did not follow

[8] The majority opinion has engaged in a crass lifting out of context in its suggestion that the hearing officer held that Gabriel was not entitled to a free public education. As the above findings make crystal clear, the language of the hearing officer was premised on the placement in a private school, and the district "had not been given an opportunity" but could have and would have provided a FAPE.

the standard of review contained in 20 U.S.C. §1415, as interpreted by Rowley, supra. To hold as does the majority would make a meaningless charade of all administrative proceedings. Hence, in my view the district court's decision is insupportable and should be reversed.

The majority opinion also concludes that the school district failed in its obligation to offer a free appropriate public education.

The purpose of the Act is to assure all handicapped children the right to a free appropriate public education. 20 U.S.C. §1412(1).

In an effort to define FAPE, the Supreme Court in Rowley first recognized the 20 U.S.C. §1401(18) definition:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards

> of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title. (emphasis added).

The Court then adds this to the definition:

> Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act. 102 S.Ct.at 3042

A FAPE is tailored to the unique needs of the handicapped child by means of an individual education program (IEP) prepared by local education officials in conjunction with the child's parents. 20 U.S.C. §§1401(18), (19). The Act specifies the components of an IEP as follows:

> The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the

provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever, appropriate, such child, which statements shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1401(19) (emphasis added). See also 34 C.F.R. §§ 300.340-300.349; and IDAPA 08.02.E.15, 3.h and i.

The United States Supreme Court in Honig v. John Doe & Jack Smith (#86-728 Jan. 20, 1988), has characterized the "individualized educational program" as the primary vehicle for implementing Congressional goals, and as "the centerpiece of the statute's education delivery system for

disabled children." The child study team concept is delineated in 34 C.F.R. §300.342-300.345 and IDAPA 08.02.E.15.

Contrary to the assertions of the majority, the record herein contains four IEPs for Gabriel dated September 30, 1982, December 14, 1982, December 9, 1983, and January 12, 1984. The essential components of those four IEPs are similar. The evaluations done by the Boise Independent School District in the form of psychological, physical therapy, and speech language evaluations formed the basis of the "Present Level of Student Performance" section. The education goals are similar and repetitive, and include activities such as recognizing letters of the alphabet, writing the letters in his name, and identifying colors. Evaluation procedures and schedules for review are noted on the IEPs. The "specific education services" are those provided by the Boise

school district as outlined in programs designed especially for Gabriel, and include occupational therapy, physical therapy, and speech therapy.

It is asserted that all of the IEPs are deficient in that they fail to provide that mainstream placement in regular classrooms is appropriate for Gabriel. That assertion, of course, begs the question posed by the demands of the parents. They contend that the school district's proposed placement in a special education class with some limited education program is by law inappropriate. The school district, on the other hand, contends that Gabriel's individualized education program is more appropriately delivered in that special class. Hence, the pivotal issue is whether the district's offer is appropriate under the Act, or whether in all cases mainstreaming is the only appropriate public education under the

Act. The district court concluded that there is a preference for mainstreaming, and that such is a presumptive requirement of an appropriate public education under the Act, "thus absent the evidence that the child cannot meet the academic requirements of his IEP in a mainstreamed environment, any non-mainstreamed placement is legally insufficient and cannot possibly constitute a free appropriate public education."

The record indicates that a Ph.D. psychologist, Christine Pickford, recommended that Gabriel be placed in a special education classroom because of her opinion that a trained special education teacher is required to provide appropriate programs. Concerning mainstreaming, she testified:

> I also had some concerns that in the regular classroom the act of mainstreaming ... is not necessarily beneficial to his optimum education and my concern about that is Gabriel benefits most from systematic instruction. And being in a classroom with other... with 3rd grade students...is normalized in that he's not surrounded by other

> handicapped children, however he also does not have the benefit of the precision teaching that would occur in a small classroom. (Tr., at 64) (emphasis added).

The special education teacher of the class to which Gabriel would have been assigned, testified as to the extent of the "mainstreaming " contacts that special education children have with non-handicapped children. It should be noted that the district did not propose that Gabriel be placed in a segregated facility exclusively for mentally retarded children. Gabriel would have been placed in Franklin Elementary School in a special education classroom. He would have interaction with non-handicapped children during lunch, recess, physical education, and other classes as he was able to handle them. As indicated in Roncker, 700 F.2d 1058 (6th Cir. 1983), a child's FAPE as determined by his IEP must be structured to permit him to benefit from instruction. In

the instant case it is asserted that Gabriel should be placed in a regular third grade classroom. There is no assertion that Gabriel would have benefitted by that regular instruction, but would benefit only from the assistance of the one-to-one aide. On the other hand, the school district asserts that Gabriel would only benefit from instruction by specially-trained teachers in the special education class.

I disagree with the conclusion of the district court which is essentially affirmed by the majority opinion here that main-streaming of handicapped children is required.

The United States Supreme Court in Rowley, supra, stated: "The primary responsibility for formulating the education to be afforded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by

the Act to state and local educational agencies in cooperation with the [child's] parents." Rowley, supra, at 3051. The Rowley court also stated: "The Act's use of the word 'appropriate' [reflects] Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children." Rowley, supra, at 3046, n.21. At page 3049 the Rowley court indicated that mainstreaming is preferred (not required) and states:

> Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. [Emphasis added.] In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if [emphasis added] the child is being educated in the regular class-

> rooms of the public educational system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. (emphasis added).

Hence, I would hold that while the Act requires that handicapped children receive specialized education, it does not necessarily require "mainstreaming" in cases where the child would receive no educational benefits therefrom. See Roncker, supra; Gregory, 311 F.2d 1307 (9th Cir. 1987).

As stated in Wilson v. Marana Unified School District No. 6 of Pima County, 735 F.2d 1178 (9th Cir. 1984):

> We are well aware of the importance of this [mainstreaming] policy; however, it is a policy which must be balanced with the primary objective of providing handicapped children with an "appropriate" education. See Johnston by Johnston v. Ann Arbor Public Schools, 569 F.Supp. 1502, 1508-09 (E.D.Mich. 1983) (transferring child from a regular classroom to a special education classroom does not violate the EACHA's goal of mainstreaming so long as special education is necessary and appropriate). See also Rowley, 458 U.S. at 181,n.4, 102 S.Ct. at 3038, n.4. (emphasis added).

In Mark A. v. Grant Wood Area Education Agency, 795 F.2d 52 (8th Cir. 1986), the court stated:

> We reject the view that the main-streaming provisions of the Act are satisfied only if a handicapped child is educated in the same classroom with nonhandicapped children. Springdale School District #50 v. Grace, 693 F.2d 41, 43 (8th Cir. 1982). Alleah, at the very least will be educated in the same school with non-handicapped children. (emphasis original).

The court in Rowley stated: "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs was left by the Act to state and local educational agencies in cooperation with the parents." 458 U.S. at 3051 (emphasis added).

The majority provides no insight into any "evidence" presented to the district court which amplified, modified, or contradicted any evidence presented at the

administrative hearing. In fact, no evidence was presented before the district court, and hence, the district court had only the transcript of the testimony presented at the administrative hearing.

The evidence at the administrative hearing, contrary to the assertions of the majority, supports the findings of the hearing officer that IEPs were developed for Gabriel, and that based thereon the district developed a free appropriate public education program for Gabriel. That FAPE was declined by Gabriel's parents.

The majority opinion states: "The school district argued that its segregated education was appropriate argument that is entirely irrelevant and superfluous to any discussion of the real issue in this case." In my view that statement of the majority is clearly erroneous, and results in its subsequent and murky attempted analysis. The

crux of the case is indeed whether the program tendered by the district was appropriate." If that which was tendered by the district was not appropriate, the majority is correct. The majority arrogates to itself, as did the district judge, the authority to substitute its judgment for that of the local school and state educators as to what is, or is not, an appropriate education for this particular child. Such action by the majority flies squarely in the face of the strictures laid down by the United States Supreme Court in Rowley.

The evidence tendered at the administrative hearing indicates that a free appropriate public education was tendered by the school district. As noted by the hearing officer, the parents "conceded that they had never questioned the ability, resources, and personnel available to the district to provide free appropriate public

education to Gabriel." Thus, the hearing officer concluded that the district "could provide, and that Gabriel would have available to him, were he placed in the public schools, a free appropriate public education."

The majority opinion states at page 17:

> By affirming the district court, we do not mean to denigrate the expertise of the school authorities for determination as to the appropriateness of various forms of education. Courts must consider the determinations of school authorities regarding the most appropriate form of education and courts must recognize that the school authorities may validly find mainstreaming inappropriate where the educational experience would/could not be productive or enriching to the student, or where it would disrupt the classroom.

I suggest that such statement is a correct view, but in the instant case the Court has failed to apply it, and in fact has overturned those determinations of the school authorities regarding the most appropriate form of education. The district court and

this Court have substituted their judgments as to the most appropriate form of education for this particular child.

From that point on the majority's opinion slides off into murky waters inevidently holding that the district failed in its responsibilities for an IEP, and an offer of a FAPE. The opinion of the majority utterly fails to discuss the validity or invalidity of the IEP or the FAPE except as to the factor of mainstreaming. As to mainstreaming, the Court in the above quotation recognized its responsibility as per Rowley to refrain from substituting its judgment for the expertise of the local and state education authorities for determination as to the appropriateness of the various forms of education, and that the school authorities may validly find mainstreaming inappropriate. In the instant case the school authorities determined that

mainstreaming full time in a regular classroom would not be appropriate for Gabriel. The evidence is clear that such determination was made on the basis that Gabriel's needs would be best served in a special class conducted by teachers specially educated, trained, and possessing expertise in the education of mentally handicapped children.

As enunciated by the majority, and clearly held by the previously-cited authorities, mainstreaming is not appropriate for every child under all circumstances. In the instant case the only evidence before the district court and this Court is that full time mainstreaming was not appropriate for Gabriel. The majority opinion faults the school district and bases its decision on the district's alleged failure to provide a valid IEP, and hence an offer of a FAPE. At that time Gabriel,

while of a chronological age of more than eight years, functioned at best at pre-school level. He had a lack of comprehension of the academic subjects offered in a third grade classroom. Whether it be at the parochial school or the Boise public schools, Gabriel's education was to consist of identification of colors, identification of letters, increasing speech utterances to beyond one or two words, and a control of disruptive or abusive behavior. Hence, placement in a regular third grade classroom would be essentially a warehousing process with the exception of any training from a one-to-one aide, who would not be a trained and licensed teacher, much less one trained in educating handicapped children. The crux of the matter is whether such a warehousing situation is best for Gabriel, or whether he will be better served by the proposal of the district.

The district made its decision based on its view of the best placement for Gabriel, and tendered such a program. Gabriel's parents unilaterally rejected such a proposal, deciding rather to continue the third grade regular classroom experience in the parochial school. There is no argument that the school district could override the decision of the parents. However, the fact that the parents placed Gabriel in a private school does not serve to demonstrate that the decision of the school district was erroneous.

As previously discussed herein, the school district engaged in voluminous testing and evaluation to determine the abilities and capacity of Gabriel. Using a valid IEP based on those abilities and capacity, the district proffered a free appropriate public education. The proffer was refused by Gabriel's parents who opted

instead to retain Gabriel in the parochial school program. There is no assertion, much less a showing, that the district acted arbitrarily, capriciously or with any intent to deprive Gabriel of a free appropriate public education. The record clearly demonstrates that the parents refused to accept the district's decision as to what was "appropriate" education for Gabriel, refused the proffer of the district, and placed him in a private institution.

Since in my view the district offered a free appropriate public education, the district had no responsibility to provide funding for an education which was not appropriate. The district, in effect, tendered financial assistance for all portions of Gabriel's education in the private parochial school except that part relating to the one-to-one aide. As noted herein, the <u>total</u> funding for the parochial

school program has been continued during the course of this appeal. It is now the year 1988, the matter should be resolved, and guidance should be given to the public school educators in this state. I would reverse the decision of the district court, and reinstate the decisions of the administrative agencies.

BAKES, J. concurs.

Coalition of Advocates for the Disabled
1510 West Washington
Boise, ID 83702
Phone: (108) 336-5353 (TTD)
J. Brent Marchbanks, Attorney for
Petitioners

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR
THE COUNTY OF ADA

GABRIEL THORNOCK, by his next friend and mother LANA (THORNOCK) BAUGH and LANA (THORNOCK) BAUGH Petitioners v. BOISE INDEPENDENT SCHOOL DISTRICT #1 Defendant	CASE NO. 85493 FINAL JUDGMENT

This matter having come before this Court, and the transcript of the administrative procedures having been made a part of the record, and this Court having heard arguments by attorneys for both sides, both as to the merits of the case in chief, and pre and post trial motions; and it appearing that the Plaintiffs are entitled to prevail:

IT IS HEREBY ORDERED AND ADJUDGED:

That Judgment be entered against the Defendant, Boise Independent School District No. 1, in favor of the Plaintiffs, in the amount of $7,936.39, plus interest at the current rate, from the date of this Judgment.

DATED This 10th day of March, 1986.

/s/
District Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY That I mailed a true and correct copy of the above and foregoing Judgment to the following:

J. Brent Marchbanks
Coalition of Advocates for the Disabled
1510 West Washington
Boise, Idaho 83702

Stewart A. Morris
Attorney at Law
P. O. Box 1001
Boise, Idaho 83701

by depositing the same in the United States mail, postage prepaid, this 10 day of March, 1986.

CLERK OF THE DISTRICT COURT

By /s/ linda haugen
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GABRIEL THORNOCK, by and through his next friend, Lana Baugh, and LANA BAUGH, Plaintiffs, v. BOISE INDEPENDENT SCHOOL DIST. NO. 1, Defendant.	Case No. 85493 MEMORANDUM OPINION FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

This case comes before the Court after plaintiffs filed a complaint against defendant asking for review of the decision of hearing officers appointed pursuant to 20 U.S.C. §1415(b)(2) and (c).

FACTS

The plaintiff, Gabriel Thornock, is a twelve year old multiply handicapped child. His disabling conditions include epilepsy, cerebral palsy and moderate mental retardation. In September, 1981, Gabriel and his mother, Lana Baugh, lived in the Meridian

School District and Gabriel was enrolled in the public schools there. In November, 1981, the Meridian schools unilaterally changed Gabriel's placement, causing Mrs. Baugh to take him out of public school and place him in a private day care facility.

The next fall, Gabriel started school at St. Joseph's School, a private school located in Boise. Because Gabriel lived in the Meridian School District at this time, the Meridian School District, rather than Boise School District, was asked to pay the cost of his supplemental educational services. The question of who should pay for these services, and what services should be included, resulted in a lawsuit, Thornock v. Evans, Ada County Civil Case No. 78074. In that case, Judge Schwartzman ordered the Meridian School District to pay a pro rata share of the aide services Gabriel required in the private school.

In August, 1983, Gabriel and his family moved into the Boise School District. Gabriel was enrolled again in St. Joseph's School and arrangements were made for a Child Study Team (CST) meeting to develop an Individual Education Program (IEP) for Gabriel. One meeting was held on August 29, 1983, but no IEP was developed. In a letter dated August 32, 1983, Dr. Tom Woychick, Director of Pupil Personnel Services for the school district, summarized the results of the meeting by stating that tentative agreement had been reached with regard to provision of various therapeutic services by the district. The letter went on to discuss the question of mainstreaming, noting that this was a primary reason for Gabriel's current placement at St. Joseph's and claiming that "[m]aximized opportunity for interaction with non-handicapped would also be the intention of our program with the

public school." No other details about the offered public school placement are given.

A subsequent meeting of the CST on November 15, 1983 brought the issue of public school placement to the forefront. At this time the school district spelled out its offer of a public education, namely placement in a segregated classroom of approximately ten handicapped students at Franklin School with a Special Education Teacher and one aide.

Gabriel's parents refused to accept the proposed placement, arguing that the placement was in an overly restrictive environment and inferior to his placement at St. Joseph's School. This disagreement has led to the instant case.

During the pendency of this dispute, Gabriel has continued to attend St. Joseph's School and has made remarkable progress in his program there. At St. Joseph's Gabriel

has been mainstreamed in the 3rd and 4th grades with the services of a full-time one-to-one aide.

On November 23, 1983 Gabriel, acting through his mother as next friend, requested the Boise School District to appoint an impartial hearing officer to determine whether the district was offering an appropriate education of Gabriel and whether Gabriel should be reimbursed for his private school tuition. The hearing was held before hearing officer Kenneth L. Mallea, Esq. on January 23-25, 1984. The hearing officer issued his decision on March 8, 1984, and proper notice of appeal was made on March 20. On appeal, the State Department of Education appointed Wm. Lyman Belnap, Esq. as the Review Officer. He released his decision affirming the hearing officer's decision on May 8, 1984.

On June 7, 1984, plaintiffs filed a

"Petition for Judicial Review of a Final Decision of a Contested Case by an Administrative Agency I.C. 67-5201 et. seq." in this Court. Fifteen days later (on June 22), plaintiffs filed an "Amended Petition For Judicial Review of a Final Decision of a Contested Case By An Administrative Agency I.C. 67-5201 et. seq." Both "petitions" named the Idaho Department of Education, Jerry Evans (State Superintendent of Public Instruction) and Martha Noffsinger (Director of the Office of Special Education) as defendants, along with Boise Independent School District No. 1. Evans, Noffsinger and the Department of Education were voluntarily dismissed pursuant to a stipulation by the parties on December 2. This left Boise Independent School District No. 1 as the sole defendant.

The Court, accepting the statement on the face of the petition that this was an appeal pursuant to I.C. §67-5201 et seq.,

ordered the plaintiff to produce a transcript from the agency and set time limits for submission of briefs. On October 31, 1984, oral arguments were held on the appeal.

On February 12, 1985, the Court issued a Memorandum Opinion and Order in which both parties were informed of the Court's decision that the case is properly governed by federal law, 20 U.S.C. §1415, not the State APA. Recognizing that both parties up until this time had been proceeding with the case on the premise that the APA applied, this Court allowed both parties to object to the Court's conclusions as to the method of review and to present further pleadings or evidence or both.

Counsel for both parties objected to the decision and requested oral argument. At oral argument, counsel for Gabriel withdrew his objection, but the school

district continued to object on a number of grounds. Treating the school district's objections as a Motion to Vacate the Memorandum Opinion and Order, the Court denied the motion and gave defendants 10 days to file a responsive pleading and inform the Court of any desire to introduce further evidence.

The school district filed an answer to the Plaintiff's Complaint, but did not request to present any further evidence. Therefore, this case is fully submitted on the evidentiary record made before the hearing officers.

ANALYSIS OF PROCEDURAL ISSUES

I.

The school district in its Answer alleges that "Gabriel Thornock, being a minor, is an improper party to this litigation, and should be allowed to proceed . . . only through a court appointed guardian ad litem."

This argument is without merit. While it is true that a minor cannot sue on his own, a minor may sue through his general guardian. (I.C. §5-306; I.R.C.P. 17(a)). The Court must appoint a guardian ad litem in any case under the Child Protective Act in which it appears that the child's interests are not being fully represented, I.C. §16-1618, but this case is not under the Child Protective Act and Gabriel's interests are, in the judgment of this Court, being fully represented. In all cases outside the Child Protective Act, the Court may appoint a guardian ad litem if the Court deems such appointment expedient (I.C. §5-306).

For over three years of litigation through two lawsuits against two different school districts, Lana Baugh has diligently and expediently pursued her son's interests in this case. Nothing in the record before this Court would suggest that Gabriel could

be more expediently, appropriately or diligently represented by a guardian ad litem than he is presently being represented by his general guardian, his mother.

Furthermore, this case is before the Court pursuant to 20 U.S.C. §1415. That section clearly speaks of procedures to protect "handicapped children and their parents and guardians." It would violate the tenor of that section if not its express language if this Court were to deny Gabriel's mother the right to represent her son in this proceeding.

II.

The next issue before this Court is whether this case is properly decided under federal law rather than the State Administrative Procedures Act (APA), I.C. §67-5201 et seq.

In the Memorandum Opinion and Order issued by this Court on February 12, 1985,

we stated:

> This dispute is between Gabriel Thornock and the Boise Independent School District. The evidentiary hearing was held before a hearing officer appointed by the school district. The dispute does not involve any "State board, commission, department, or officer, (emphasis added.) Therefore, . . . this case is not properly before the Court under the APA.

Id. at 3.

Counsel for the school district now argues that the two hearing officers were both appointed by the Department of Education; therefore, this case involves the decision of a State board, commission, department, or officer and falls under the APA. Factually, this claim appears inconsistent on its face with the proceedings conducted before the hearing officers. Every document submitted to the hearing officer by the school district contained the exact heading: "Before the Independent School District of Boise City, State of

Idaho." However, even if the State Department did appoint the hearing officer, the fact resolves nothing and merely raises additional problems. If in fact the Department rather than the school district did appoint the hearing officer, then the appointment of a review officer was both erroneous and superfluous under 20 U.S.C. §1415.

More importantly, even if the school district were correct in stating that the APA can apply to this case, any attempt to apply the APA would violate the supremacy clause of the United States Constitution. By accepting federal funds under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §1411 et seq., the State has adopted the federal procedural scheme for resolving disputes under that Act. 20 U.S.C. §1415. As the United States District Court stated in Vogel v. School Board of

Montrose R-14 School District, 491 F.Supp. 989 (W.D. Mo. 1980), "[W]henever a conflict exists between the procedural safeguards mandated by 20 U.S.C. §1415 and State law [,] the applicable federal law is controlling." Id. at 993. See also Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981); Monahan v. Nebraska, 491 F.Supp. 1074 (D. Neb.), aff'd in part, vacated in part on other grounds, 645 F.2d 592 (8th Cir. 1980); Campochiano v. Califano, No. H-78-64 (D. Conn. May 19, 1978).

The school district argues that plaintiffs have chosen to review this decision under the APA rather than federal law and that the Court errs in interfering with this choice. The ability of plaintiffs to chose the APA over federal law is based on the district's assumption that the Supremacy Clause can be waived by the

parties and the Court is then forced to apply state law even if that state law is inconsistent with and thus preempted by federal law.

The argument is without merit. The laws of the United States are as much a part of the laws of this and every other state as are our respective local laws. Houenstein v. Lynham, 100 U.S. 483 (1880); Claflin v. Houseman, 93 U.S. 130 (1876). Reading the APA and EAHCA in pari materia, this Court concludes that the APA does not purport to cover an appeal under the EAHCA procedures in 20 U.S.C. §1415. If the APA did purport to apply to such appeals it would clearly be preempted because it does not provide the same safeguards provided under the federal law. Once the federal government has chosen to address a subject, the states are powerless to detract from the protections provided by that government. Kleppe v. New

Mexico, 426 U.S. 529 (1976); United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972); Reina v. United States, 364 U.S. 507 (1960); Adams v. Maryland, 347 U.S. 179 (1954); Hines v. Davidowitz, 312 U.S. 52 (1941); McCulloch v. Maryland, 17 U.S. 316 (1819). This doctrine of preemption applies to procedural protections as well as substantive law. Southland Corporation v. Keating, U.S. , 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). Nothing in the case law suggests nor can this Court find any logic to support the district's proposition that contradictory state and federal laws create alternative means for adjudicating disputes to be applied according to the parties' choice of law.

III.

Prior to delving into the substantive areas of this dispute, the Court must determine the appropriate standard of review for a case under the EAHCA .

In 20 U.S.C. §1415(e)(2), Congress states that "the court shall receive the records of the administrative proceedings, shall hear additional evidence of the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate."

The school district, citing Board of Education of the Hendrick Hudson Central School District v.Rowley, 458 U.S. 176 (1982) claims that this Court's review is not a de novo review basing the decision on the preponderance of the evidence, rather the district would impose an "implied limitation" on the Court's review and require "due weight" to be given to the hearing officer's decision.

The Rowley decision involved a student who was mainstreamed and receiving passing grades in the standard program of study.

The dispute in Rowley was whether the district should be using federal money to provide the student with a deaf language interpreter. Given the Court's holding that the student was receiving an appropriate education, the Court understandably stated that "courts must be careful to avoid imposing their view of preferable methods upon the states." Rowley, 458 U.S. at 207.

Unlike Rowley, the instant case does not involve a school district's choice between two appropriate educational alternatives. Rather, the question here is whether the education offered is appropriate at all. This Court does not abuse the preponderance of the evidence standard by measuring the educational policies of the school district against the Congressional requirements. The question before the Court is whether the education offered plaintiff is appropriate.

This Court will not violate Rowley's directive by comparing appropriateness and forcing the district to choose a more appropriate educational program over a less appropriate, albeit appropriate, alternative, if that result is required by controlling federal law.

Rowley required that due weight be given to the proceedings before the hearing officer, not to the subsequent decision by the hearing officer. This would indicate that the evidence presented in the hearing be considered as much a part of the record as any proceedings before the Court as long as those proceedings comply with 20 U.S.C. §1415. It does not imply that the hearing officer's findings and conclusions should rise beyond whatever persuasive value they have in the Court's decision on the merits.

Finally, one should note that the school district's argument is irrelevant to

the outcome of this case. The evidence in this case, unlike most cases, is clear and uncontroverted as to every relevant fact. By any standard of evidentiary review this Court's ruling would have to be the same as is herein announced.

SUBSTANTIVE ISSUES

IV.

The initial question before the hearing officer and the principal issue now before the Court is whether the facts of this case show that the school district failed to offer Gabriel a free appropriate public education. A prerequisite to this factual finding is properly defining the term "appropriate education."

Federal law requires mainstreaming of handicapped children wherever feasible, but it is unclear whether mainstreaming is a presumptive requirement of a free appropriate public education or merely one factor

to consider in a balancing test.

In 20 U.S.C. §1412(5), Congress requires states to establish:

> "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

A great deal of confusion arises in applying this section because the Education for All Handicapped Children Act covers all types of handicaps, from mental retardation to being hard of hearing. 20 USC §1401(1). Some persons would interpret §1412(5) to apply only to physical handicaps such as deafness or blindness while others would include the mentally retarded under the mainstreaming provision of 1412(5).

Further confusion is added by the U. S.

Supreme Court's decision in Rowley. Amy Rowley, a deaf child, sued the school district to force it to provide her with a sign language interpreter in her first grade class. The facts clearly showed that Amy performed better than average in her class and was advancing easily from grade to grade. However, because of her deafness, Amy understood considerably less of what went on in class than she would have if she had not been deaf. The District Court and Court of Appeals held that Amy was not receiving a free appropriate public education because she did not have an equal opportunity with non-handicapped children to achieve her full potential. The Supreme Court reversed.

The Court recognized the wide variety of handicaps covered by the Act and therefore expressly confined its analysis to the facts in Rowley, namely "a handicapped child

who is receiving specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system . ..." 458 US at 202.

The Court then discussed mainstreaming of handicapped students in regular classrooms in terms of evidencing an appropriate education. Repeatedly, the Court referred to regular examinations and yearly advancement from grade to grade. The Court held that an IEP should be designed with the goal of permitting the child to "benefit educationally" and implicitly held that advancement from grade to grade is prima facie proof of educational benefit. 458 US at 202-04.

The school district in the instant case clearly interprets Rowley to mean that mainstreaming is only appropriate when the handicapped child can progress from grade to grade. In the administrative hearing, the

district's attorney repeatedly asked questions regarding this standard:

> "And you realize, though that the IEP that has been designed for him isn't reasonably designed for him to achieve passing marks in any classroom and to advance from grade to grade." Transcript at 23 (cross examination of Lana Baugh, Gabriel's mother).
>
> "Uh . . .you would agree, would you not, if we're going to define educational benefit in terms of receiving passing marks and advancing from grade to grade, he wasn't receiving that type of educational benefit, was he?" Transcript at 30 (cross examination of Joel Price, Gabriel's former aide).
>
> "Let's assume the educational benefit that we're trying to obtain in the regular classroom setting is to achieve passing marks and to pass from grade to grade . . . then it really isn't appropriate to put Gabriel in a classroom for that purpose, is it?" Transcript at 47 (cross examination of Sister Martha Ann Norwood, Principal of St. Joseph's School).
>
> "We're not . . . in other words, the reason we're placing Gabriel in a classroom that he's in is not for educational benefit in the sense that he'd be able to achieve passing marks and to graduate to the 4th Grade or a junior high or whatever." Transcript at 55 (cross-examination of Dr. Michael Day, Psychologist).

Given the clear statement by the Supreme Court in Rowley that its analysis was confined to the factual setting of that case, we find it impossible to accept the school district's use of a grade to grade advancement standard to define educational benefit for mentally retarded students. Adoption of the Rowley standard in such cases would effectively deprive all mentally handicapped students of the benefits of mainstreaming. The better reading of Rowley is that when a physically handicapped student is participating in the regular curriculum, is being educated with non-handicapped students, and is achieving passing grades, a strong presumption is made that the education provided is appropriate.

Congress clearly stated that handicapped children must be mainstreamed to the maximum extent appropriate. It did not distinguish between physically and mentally

handicapped. The only exception is found when, despite the use of supplementary aids and services, education of the child cannot be achieved satisfactorily. Given the fact that the IEP process is designed in part to define satisfactory education for each child on an individual basis and that this process is part of the statutory scheme, we cannot conclude that Congress intended mainstreaming to be restricted to those who could progress from grade to grade in the normal academic program. Rather, the ability of the child to be mainstreamed successfully will depend on the goals of the IEP and the child's achievement of those goals.

Under the strong Congressional preference for mainstreaming reflected by the terms of §1412(s), we conclude that a child must be included in a regular class and educated there with those supplemental aids

and services required until his lack of progress under the IEP proves such placement to be inappropriate.

Furthermore, we conclude that the preference for mainstreaming is so strong that it must be considered as a presumptive requirement of a free appropriate public education and not merely as a balancing factor. Thus, absent evidence that the child cannot meet the academic requirements of his IEP in a mainstreamed environment, any non-mainstreamed placement is legally insufficient and cannot possibly constitute a free appropriate public education.

V.

Given this definition of an appropriate education, we must decide if the evidence shows that the school district offered Gabriel a placement with mainstreaming to the maximum extent appropriate. If this offer was not made, Gabriel was not offered

an appropriate education.

In the evidentiary hearing, Ms. Gerri Hobdey, Special Education Teacher at Franklin School and the teacher of the public school class to which Gabriel would be assigned, testified about the mainstreaming efforts with her class. The substance of these efforts is that the handicapped children are with non-handicapped children "during the lunchtime and lunch hour" and for "an hour on the playground." In addition, the class has "4th grade children that come down once a week to work with them" and "a 5th grade boy that comes down every day in the afternoons...." Beyond this, Ms. Hobdey testified, "I have a boy now that is in 3rd grade P.E. ...I have another boy that is going into a reading program with other children ...." (Transcript at 135). This seems to be the extent of the mainstreaming for the ten children in

the Franklin School Special Education class.

One probable reason for the lack of mainstreaming in Franklin School is the district's policy of placing the burden of proving appropriateness on the child. Ms. Hobdey testified that mainstreaming is provided, "[i]f the child is able to handle [it] and it's appropriate [for] him." (Transcript at 135). This policy contravenes the intent of Congress that mainstreaming take place wherever possible. This intent can only be fulfilled when the burden is placed on the school to prove the inappropriateness of a mainstreamed placement prior to segregating handicapped children.

In addition, school district personnel consistently refer to a segregated program as educating the handicapped children "with their peers." (See, e.g., Transcript at 137, Morris: "a self-contained classroom

of his [Gabe's] peers...." Hobdey: "self-contained with the children that would meet his needs socially.").

The district's policy against mainstreaming goes so far as to preclude any mainstreaming at all for a girl who was described as having "very good verbal skills," who assists the other children with certain lessons, and who is able to correct their mistakes (Transcript at 139-40).

The Supervisor of Special Education for the school district, Jack Nelson, testified that the district would not mainstream a child without any hope of achieving passing marks and advancing from grade to grade (Transcript at 121).

Dr. Christine Pickford, Psychologist for the district, summed up the basic approach of the entire district to education of the handicapped in her testimony. With regard to mainstreaming Gabriel, she said,

> I also had some concerns that in the regular classroom the act of mainstreaming. . .is not necessarily beneficial to his optimum education and my concern about that is that Gabriel benefits most from systematic instruction. And being in a classroom with other .. with 3rd grade students . . is normalized in that he's not surrounded by other handicapped children, however he also does not have the benefit of the precision teaching that would occur in a small classroom." (Transcript at 64).

Dr. Pickford went on to recommend placement of Gabriel in a self-contained classroom in a large part because of her perception that a trained special education teacher is required to provide appropriate programs. (Transcript at 65-66).

The bottom line of all this testimony is that the Boise School District officials differ with Congress as to what elements go into an appropriate education. While the school district clearly puts emphasis on the training of the teacher, Congress has equally clearly labelled mainstreaming as the critical ingredient in an appropriate

education. Since acceptance of the federal funds provided under the EAHCA requires acceptance of Congress's standards for educating handicapped children, the school district has legally obligated itself to accept mainstreaming as a presumptive requirement of an appropriate education and cannot attempt now to argue against the policy.

The question of contradictory policies was faced by the United States District Court in Campbell v. Talledega County Board of Education, 518 F.Supp. 47 (N.D. Ala. 1981). There the court said:

> "Although defendants' experts dispute the soundness of the mainstreaming approach to the education of the handicapped, Congress has made a clear choice among competing educational philosophies. In electing to receive federal funds, the state of Alabama has bound itself to act in accordance with that philosophy.

Id. at 55.

The Campbell decision was followed in

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), where the court said:

> The perception that a segregated institution is academically superior for the handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate.

Id. at 1063.

All the evidence points to a refusal of the school district to provide Gabriel with mainstreaming even though the district failed to carry its burden of proof to show that mainstreaming of Gabriel would fail to provide him with satisfactory progress pursuant to his IEP. In fact, the evidence shows that Gabriel affirmatively proved by his performance over the prior two years that mainstreaming would be appropriate. The extensive testimony by the school district that its segregated program provides an appropriate education is irrelevant when as a matter of law main-

streaming is a presumptive requirement of an appropriate education.

VI.

The school district raises the fact that Gabriel's parents placed him in a private school and expressed no interest in a public school placement as a defense. Thus, the school district asserts it had no duty to offer Gabriel a free appropriate public education.

This claim is unpersuasive. Gabriel and his family moved to the Boise School District only weeks before the 1983-84 school year started. It would be unreasonable to expect them to have abandoned Gabriel's current educational placement at St. Joseph's School without some solid offer of an appropriate education elsewhere. Furthermore, 20 USC §1415(e)(3) states that during the IEP review process, absent an agreement to the contrary, "the child shall

remain in the then current educational placement ...." In this case, there was no agreement to the contrary so Gabriel stayed at St. Joseph's School exactly as the statute directs.

Once the August 29, 1983, CST meeting took place, Gabriel's parent were aware at least of the basic type of placement the school district would offer. Given the Congressional preference for continuity in placement and this Court's decision that the district's placement offer is presumptively inappropriate, Gabriel's parents, by refusing the district's offer and maintaining the St. Joseph's placement, did not waive his right to a free appropriate public education.

The school district also relies on a proposed stipulated settlement of this case that was signed by Gabriel's parents but refused by the school district. The

district asserts that this document is evidence of the parents' lack of intent to enroll Gabriel in the public schools. Although this obviously inadmissible evidence is in the record, this Court refuses to consider it at all in deciding the case because a proposed settlement has absolutely no probative value when offered by a party refusing to accept the proposal as an admission by the party opponent.

Finally, even if we accepted the school district's claim that Gabriel's parents waived his right to an appropriate public education, strong policy reasons would dictate that the school district is obligated to offer such an education regardless. If the district had no obligation to affirmatively offer a free appropriate public education, a burden would be placed on the parents of handicapped children to solicit such offers from the district. Thus

parents potentially would have to feign interest in a school district's patently inappropriate offer until that offer was in a final form that could be challenged in the courts, or they would forfeit their child's right to a free education. The practical effect of this would be that two handicapped children in identical circumstances could be attending a private school, one with public payment of tuition, the other without. The only difference between the two would be the willingness of the former's parents to play a charade with the school district officials.

We conclude that the school district has an affirmative duty pursuant to the EAHCA to offer a free appropriate public education to all handicapped children living within the district. See Hawaii Department of Education v. Katherine D., 727 F.2d 809 (9th Cir. 1983), cert. denied, 53 U.S.L.W.

3824 (May 20, 1985). This affirmative duty exists regardless of the intentions of the parents with respect to private school placement. Failure by the parents to obtain some offer of public placement from the school district will not relieve the district of its obligations either to show that a free appropriate public education is available to the handicapped child or to provide him an appropriate education in a private school at public expense.

VII.

An additional issue arises as to the necessity of Gabriel's one-to-one aide services as part of his appropriate education.

The facts of this case show that Gabriel has been mainstreamed for the past two school years with the help of a full-time, one-to-one, teacher's aide. The school district, rather than rebut the

plaintiff's evidence that a full-time aide is necessary for mainstreaming or introduce evidence to show that the aide could be less than one-to-one, argues that it cannot provide aide services with Part B funds (funds distributed under the EAHCA) because the district's aides are paid through local funds. The district's Part B funds must be used to supplement not supplant locally funded programs, thus they are used for other related services such as occupational therapy and physical therapy.

Reading the entire Act in pari materia, this Court cannot agree with the district's argument. Since mainstreaming is a presumptive requirement for an appropriate education, any related services which make mainstreaming possible, by Congressional directive, must take priority over other related services. While the district correctly states that Part B funds must supplement not

supplant locally funded programs, nothing in the Act precludes the use of Part B funds for aide services above those already provided by the school district. In fact, when read in pari materia, the Act indicates the key additional requirement for Part B funds is that they be used to provide additional services to handicapped children starting with the basic provision of a free, appropriate public education.

This conclusion does not constitute a usurpation of the district's power to choose the educational method most suitable for the needs of children within the district. Rather, it is a recognition that upon receiving Part B funds from the federal government, the district agreed to limit its power by accepting mainstreaming of handicapped children as a presumptive requirement of an appropriate education and accepting the condition that those funds be used first

to achieve that goal of an appropriate education. Furthermore, the district, by receiving Part B funds, accepted the jurisdiction of this Court to grant appropriate relief to parties aggrieved by its actions with regard to the use of those funds, including an order forcing the district to use those funds to provide whatever additional aide services are necessary to mainstream mentally handicapped students prior to using the funds on other related services which were not necessary for mainstreaming.

Given the conclusion that Part B funds can be used for aide services and must be used for such when they are necessary to mainstreaming, the question remaining is whether plaintiffs have proven their need for aide services and the quantity of aide services needed.

Plaintiffs introduced substantial

evidence showing the educational and medical reasons for providing Gabriel with full-time aide services. The district introduced no rebuttal evidence to show that such full-time aide services could be provided by other than a full-time one-to-one aide. Hence, the district is responsible to provide such as a part of Gabriel's free appropriate education for the 1983-84 and 1984-85 school years.

VIII.

The final question before this Court is whether the school district can be ordered to reimburse Gabriel's parents for their expenses, namely tuition and full-time, one-to-one aide services, incurred in providing him with the appropriate education the school district failed to offer him.

This question was recently resolved by the United States supreme Court in Burlington School Committee of the Town of

Burlington v. Massachusetts Department of Education, U.S. , 53 U.S.L.W. 4509 (April 29, 1985). In Burlington, the Court stated that "by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." Id. at 4512. As the Court noted, failure to allow reimbursement would give parents "an empty victory" by telling them they correctly placed their child in an appropriate private placement rather than accept an inappropriate public placement, but they cannot be reimbursed for the expenditures they made that the school district should have been paying all along.

CONCLUSION

For the foregoing reasons, the defendant, Boise Independent School District No. 1, must reimburse plaintiffs for Gabriel's tuition at St. Joseph's School

plus payments made to his one-to-one aides for the 1983-84 and 1984-85 school years.

This Opinion will serve as Findings of Fact and Conclusions of Law.

IT IS SO ORDERED.

DATED This 24th day of June, 1985.

/s/ J. Ray Durtschi
J. Ray Durtschi
District Judge

IN THE STATE OF IDAHO, STATE DEPARTMENT
OF EDUCATION
ADMINISTRATIVE HEARING

In the Matter of GABRIEL THORNOCK.	) FINDINGS OF FACT,) CONCLUSIONS OF LAW,) AND DECISION

PARTIES

The parties to this administrative hearing are the Petitioner, Gabriel Thornock, by his next friend and mother, Lana Baugh, hereinafter sometimes collectively referred to as "Petitioner", represented by Brent Marchbanks, Esq., and the Independent School District of Boise City, hereinafter sometimes referred to as the "District", or the "Respondent", represented by Stewart A. Morris, Esq.

PURPOSE OF THE HEARING

This administrative hearing was held in the District conference room on the 24th, 25th and 26th days of January, 1984. Pursuant to stipulation of the parties, by

and through counsel, additional post-hearing briefing was submitted and the matter was finally submitted to the Hearing Officer on February 24, 1984. The purpose of the administrative hearing was to consider the following issues:

1. Whether the Petitioner is entitled to reimbursement for tuition paid to a private school, beginning with the fall semester of the 1983-84 school year.

2. Whether the Petitioner is entitled to reimbursement for the cost of a teacher's aide which has been provided to Gabriel from and since the beginning of the 1983-84 school year.

WITNESS TESTIFYING

The following witnesses were called on behalf of the Petitioner: Lana Baugh, mother of Gabriel Thornock; Joel Price, Gabriel's former aide and now a handicap specialist employed by the Idaho Migrant Council; Jim

Baugh, husband of Lana Baugh and the step-father to Gabriel Thornock; Sister Martha Ann Norwood, Principal of St. Joseph's School; Dr. Michael Day, psychologist; Dr. Christine Pickford, psychologist; Linda Becci, third grade classroom teacher at St. Joseph's; Kelly Byrne, Gabriel's aide at St. Joseph's School.

The following witnesses were called to testify on behalf of the School District: Jack W. Nelson, Special Education Consultant; Arvin Spofford, Principal at Franklin School; Gerri Hobdey, special education teacher at Franklin School; Jim Schnur, consulting special education teacher with Boise District; Patty Ehler, communication disorder specialist employed by Boise District; Dr. Thomas Woychick, Director of Pupil Personnel Services for Boise District.

DOCUMENTARY EVIDENCE SUBMITTED

Both the Petitioner and the District

offered numerous documents, letters and other written materials into evidence. The compiled written documents submitted into evidence are in the file transmitted with this Decision to the State Department of Education. The individual documents or correspondence which are relied upon in the Findings and Conclusions are specifically ref enced herein.

Counsel for the Petitioner did object to the disclosure by School District of its written materials on the grounds that the five day disclosure rule set forth at 34 C.F.R. 300.508(a)(3) had not been complied with. Counsel for Petitioner contended that the time requirements set forth in the Idaho Rules of Civil Procedure are also applicable to the federal disclosure regulation and that an intervening weekend should not be counted in the time computation.

This objection was taken under advise-

ment, and I now conclude that the due process hearing rights, and the procedures related to the introduction of evidence, are governed by the applicable federal regulation above quoted and its counterpart state regulation. This is merely an administrative proceeding, conducted under and pursuant to the regulations. This is not a judicial proceeding governed by or conducted under the Idaho Rules of Civil Procedure. I therefore conclude that the District was entitled to introduce the written materials attached to the Thornock's disclosure of evidence document dated the 16th day of January, 1984 and personally served on counsel for Petitioner on the 16th day of January, 1984. Had the federal or state regulatory agencies charged with the administration of the Act desired to limit or otherwise define the five day disclosure rule, they would have done so. I conclude

that the written materials were timely disclosed by the District.

FINDINGS OF FACT

1. Petitioner, Gabriel Thornock, is a handicapped child within the definition of the Education for Handicapped Act, 20 USC §1401(1).

2. Independent School District of Boise City is a recipient of federal educational funds under Part B of the Education for Handicapped Act.

3. Gabriel Thornock was enrolled by his parents during the fall of 1982 in St. Joseph's School, a private parochial school located in Boise, Idaho. During the 1982-83 academic school year, Lana Baugh and Jim Baugh were residents of the Meridian School District, and the responsibility for providing the special education and related services to Gabriel was the responsibility of the Meridian School District.

4. During June of 1983, Mr. and Mrs. Baugh, their counsel, Mr. Marchbanks, Sister Martha Ann Norwood, and Mr. Joel Price, met with representatives and consultants of the Boise District regarding the special education and related services which had been provided to Gabriel during the 1982-83 year. Mr. Baugh testified that during this June, 1983 meeting he and Mrs. Baugh had informed the Boise District officials that the family was moving to the Boise School District and that Gabriel was to remain at St. Joseph's and that he would need from the District related services, including a full-time one-to-one aide, to be provided at the St. Joseph's private school placement.

5. During the month of July, 1983, the family did move their residence in the Meridian School District to a new residence in the Boise School District.

6. During the month of August, 1983,

the parents reiterated to the Boise School District that Gabriel's placement in St. Joseph's would be continued for the 1983-84 academic year. By letter dated August 18, 1983, Mr. and Mrs. Baugh informed Dr. Woychick, the Director of Special Education Services for the District, that the parents would be requiring the following: (1) placement at St. Joseph's; (2) one-to-one aide; (3) physical therapy; (4) occupational therapy evaluation; (5) speech therapy. The parents further informed Dr. Woychick "you listed these services and we all understood that these services were requested." This decision by the parents was not made in consultation with or upon the recommendation of the District. The District's consent or approval to this placement was not requested or given.

7. By response dated August 24, 1983, Dr. Woychick confirmed that at the August

16, 1983 meeting the parents had indicated that they had already re-enrolled Gabriel in St. Joseph's third grade and had begun making tuition payments to St. Joseph's School. The consistent testimony at the hearing, and the documentary evidence introduced, indicate that Mrs. Baugh and her husband had decided on placement in St. Joseph's School. At no time did Mr. and Mrs. Baugh make application to the District for placement. In fact, the testimony of Mr. Baugh was that the family preferred and had selected a private setting with an individual aide, and would continue that placement so long as the family could afford it. Mr. Baugh stated that if the family could no longer afford private placement with an individual aide, he and Mrs. Baugh would need to consider a public setting. Mr. Baugh further testified on rebuttal that he informed the Boise District officials in

the August, 1983 meeting that at some future point in time the family could run out of money, and would at that point have to consider public school placement.

8. The parents firmly believe that, under all the circumstances, the best educational setting and placement for Gabriel is the private school with a full-time one-to-one aide and related services of occupational therapy, physical therapy, and speech therapy being provided by the District. I am convinced that Mr. and Mrs. Baugh have nothing but the very best intentions and interests of Gabriel in mind in making and selecting this placement. Although the appropriateness of the St. Joseph placement has been contested by experts for the District, this is not an issue before me or involved in this hearing. In the numerous meetings and correspondence that have taken place between Mr. and Mrs.

Baugh and the District, it is evident that Mr. and Mrs. Baugh have acted only with the best interests of Gabriel in mind. I place no weight whatsoever on the District's contentions that the Petitioners have tried to "build their case" or to posture this private placement so as to gain some advantage over the District. The Petitioners have every right to seek all legally available special education benefits and related services for Gabriel.

9. From the outset, the District objected to public funding of the one-to-one individual aide for Gabriel in the private placement. I find that Mr. and Mrs. Baugh, and counsel, were put on notice at the November, 1983 meeting, and earlier, by counsel for the District's memorandum that the District believed that the number of private school children, their needs, and priorities established under the Part B

funding programs, precluded the individual aide service requested by Petitioners. I find that the presentation to Petitioner, and counsel, more than adequately satisfied the five day disclosure rule set forth in the regulations at 34 C.F.R. 300.508(a)(3). Mr. Marchbanks objected to any testimony at the hearings on the aspects of part B funding, on the basis that this had not been disclosed in the "Disclosure of Evidence" pleading filed January 15, 1984. I can find no requirement that a party disclose each and every aspect of the testimony which may be adduced through any given witness. I find that the Petitioners were on notice of the Boise District determinations, and of the legal reasoning behind such determinations, and that such evidence was therefore properly presented at the hearing. In addition, there has been no showing or allegations on the part of Petitioner that

any harm or prejudice has occurred in the presentation of this testimony.

10. There is no dispute in this hearing as to whether or not the District can provide a free appropriate public education to Gabriel. Mr. and Mrs. Baugh conceded that they had never questioned the ability,resources, and personnel available to the District to provide free appropriate public education to Gabriel. Based on the testimony and evidence introduced at the hearing, I find that the Boise School District could provide, and that Gabriel would have available too him, were he placed in the public schools, a free appropriate public education. However, because Gabriel has been placed, by his parent and step-parent, into a private school, I find that the Boise District has not been required to, and has not been given the opportunity, to provide a free appropriate public education

to Gabriel.

11. The Boise District, in providing special education and related services to private school handicapped children, has determined that individual aide services will not be provided to Gabriel or to other private school students or public school students of the same or similar handicapping condition or having the same or similar educational goals to meet their handicapping conditions.

12. The Boise School District, based upon the number of eligible private school students and their needs, and based upon the resources and funding available to the District under Part B of the Education for Handicapped Act, has determined that full-time one-to-one aide services will not be provided to Gabriel Thornock.

13. The Boise District, based upon a number of factors, including the number of

Part B funds available and the relative needs of the public and private school children who reside within the District, has determined that the individualized aide services will be provided only to children with most severe handicapping conditions.

14. The Boise District decisions to not offer or provide a full-time individual aide to Petitioner has been made upon the advice of counsel and in good faith. The District has provided publicly funded occupational therapy, physical therapy, and speech therapy services to Gabriel, to the satisfaction of the parents, from Part B funds. These educational benefits and services are Part B funded and have been established by the District to meet the needs of handicapped children consistent with their number and needs.

CONCLUSIONS OF LAW

1. That the Education for the Handicapped Act at 20 USC §1413(a)(4)(B) provides that:

> Handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardians if such children are placed in or referred to such schools or facilities by the state or appropriate local educational agency as the means of carrying out the requirements of this subchapter . . . (emphasis added)

In conformance with this enabling authority, the applicable Education for the Handicapped Act regulation provides at 34 CFR 300.400:

> - Regs. 300.401 - 300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

The regulations at 300.401 through 300.403 describe the responsibilities of public educational agencies in providing

educational benefits and related services to students who have been placed in private schools by the school district as a means of providing free appropriate public education.

In view of the private placement of Gabriel by the parents into St. Joseph's School, it must be concluded that the legal obligations imposed by the foregoing sections of the Education for the Handicapped Act and regulations do not apply in this case.

2. The duties and responsibilities imposed upon Boise District in this case arise from the language of 20 USC §1413(a)(4)(A), the regulations of 34 CFR 300.450 through 300.452, and the duly promulgated regulations of the State of Idaho at §3.13 through §3.14.

Under the provisions of 34 CFR 300.2, both the Boise School District and the State of Idaho are subject to the regulator

provisions set out at 34 CFR 300.450 through 300.452. All part 300 regulations "apply to all political subdivisions of the state that are involved in the education of handicapped children. These would include (1) the state educational agency, (and) (2) local educational agencies . . .". 34 CFR 300.2(b).

Under these regulations, the Boise District has the legal responsibility of providing private school handicapped children with genuine opportunities to participate in Part B funded special education and related services consistent with the number of those children and their needs. The Boise District is required to provide special education and related services from funds available under Part B of the Act, with genuine opportunities to participate in special education and related services consistent with the number of private school handicapped children and

their needs.

3. Boise District is also subject to the legal obligations imposed by the Department of Education General Administrative Regulations (EDGAR) at 34 CFR 76.651 - 76.663. These are general regulatory provisions applicable to private school students who may be entitled to participate in certain specific federally funded educational programs. One of these federally funded educational programs is established under the Education for Handicapped Act, 20 USC §1401, et seq.

Under EDGAR 34 CFR 76.651:

> (a)(1) A subgrantee (Boise District) shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in sections 76.652 - 76.662 and in the authorizing statue and implementing regulations for a program.
>
> (2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

EDGAR at 76.654 also provides that:

(a) Program benefits that a subgrantee provides for students enrolled in private schools must be comparable in quality, scope and opportunity for participation to the program benefits that the subgrantee provides for benefits for students enrolled in public schools.

(b) Same benefits. If a subgrantee uses funds under a program for public school students in a particular attendance area, or grade or age level, the subgrantee shall ensure equitable opportunities for participation by students enrolled in private schools who -

(1) have the same needs as the public school students to be served; and

(2) are in that group, attendance area, or age or grade level.

4. Under the provisions of the Act and the regulations applicable to this case, Boise School District is not obligated to provide to Petitioner a free appropriate public education. Rather, the District is required to provide an opportunity for equitable participation in Part B funded program benefits consistent with the number

of eligible private school students and their needs.

5. In establishing program benefits under Part B of the Education for Handicapped Act, the Boise District has determined that aide services will not be provided, either in the public schools or in private schools, to students with handicapping conditions or severity equal to or similar to Gabriel's. The District has established a priority system whereby only those students having the most severe handicapping conditions receive aide services.

6. The language and policy of the Education for Handicapped Act, the regulations thereunder, and EDGAR, create in the public educational agencies the discretion to devise educational programs and related services to be provided to private school children through Part B funds. The Federal Department of Education has consistently

interpreted the Acts and regulations to the effect that the public educational agencies have discretion to determine program benefits and to establish priorities in the expenditure of Part B funds. Hartman, EHLR 211:294 (Dec. 13, 1983); Sigoloff, EHLR 211:277 (June 5, 1981); Gust, EHLR 211:155 (Jan. 22, 1980).

7. In the exercise of the discretion afforded to it under the Act and regulations, the Boise District has provided educational programming and related services to Gabriel consisting of occupational therapy, physical therapy and speech therapy. These program benefits have been and are being provided by the District upon determinations of the number and needs of private school handicapped children to be served. These services are made available to private school students on a basis comparable to that afforded to public school

handicapped children. The District has, however, in the exercise of its discretion, elected not to offer aide services in this case and the District does not and would not offer such services, even under the same similar circumstances, to public school handicapped students. This decision is within the discretion of the District and there is nothing in the record or in the Act or regulations to suggest that the District has abused its discretion in this matter or has exercised its discretion in bad faith in reaching this decision.

8. The decision making process engaged in by the District in not providing the aide services sought by the Petitioner was made in conformance with the requirements of the applicable statutes, regulations, and departmental rulings. The policy and purpose of the law in this matter is to require a principled decision by the public

educational agency, taking into consideration such factors as the number and needs of private school handicapped children residing in their district, the program benefits being provided to students enrolled in the public schools, the amount of Part B funds available, and the relative goals and priorities in allocating such Part B funds. It must be concluded that the Boise District in this case has considered these factors and has reached a decision regarding the use of part B funds within the District. The decision of the District to not provide the aide service requested by Petitioner is within the discretion of the District.

DECISION

Upon the foregoing Findings of Fact and Conclusions of Law, it is the decision of this Hearing Officer that:

1. Petitioner is not entitled to an award of tuition for the educational costs

incurred at St. Joseph's private school.

2. Petitioner is not entitled to reimbursement for prior expenses incurred in hiring an aide,and is not entitled to an aide at public expense.

BINDING EFFECT

This decision shall be binding upon the parties hereto unless an appeal is taken to the State Department of Education.

DATED this 8th day of March, 1984.

/s/ Kenneth L. Mallea
Kenneth L. Mallea
Hearing Officer

IN THE STATE OF IDAHO, STATE
DEPARTMENT OF EDUCATION
ADMINISTRATIVE HEARING

In the Matter of	)
	) FINDINGS AND
GABRIEL THORNOCK	) CONCLUSIONS
	)

PROCEDURES

An administrative hearing was held in the District conference room on the 24th, 25th and 26th days of January, 1984. The Petitioner, represented by Brent Marchbanks, requested an impartial review under Reg. 300.510.

The request for an impartial review was based upon Petitioner's dispute with all or part of the following Findings of Fact ## 10, 13 and 14, and Conclusions of Law ## 4, 5, and 7, as entered by the Administrative Hearing Officer.

The entire transcript of the administrative hearing, the evidence introduced and

the brief filed by the parties have been reviewed to insure that the procedures at the administrative hearing were consistent with the requirements of due process. In light of the extensive briefing and opportunity afforded the parties to present evidence at the administrative hearing, no additional argument or evidence is required.

FINDINGS

1. There is a reasonable basis in fact, as supported by the evidence adduced at the administrative hearing, to support each Finding of Fact and Conclusion of Law of the Administrative Hearing Officer not disputed by the Petitioner, and, therefore, said Findings and Conclusions are hereby affirmed.

2. The Boise School District (the "District") could provide a free appropriate public education to the Petitioner. Lana T. Baugh admitted that the District had the

resources to provide a free appropriate public education.

3. The District made available to the Petitioner a free appropriate public education. Although disputed by the Petitioner, there is credible evidence that the District attempted to offer a free appropriate public education. The Petitioner rejected the District's proposals.

4. The District was not required to provide a free appropriate public education to the Petitioner because the parents of the Petitioner voluntarily placed the Petitioner in a private school and indicated they did not want the Petitioner in a public school.

5. Currently there are no Part B funded aides, in the public or private schools, working at the age and grade level exceptionality of the Petitioner with school children living within the District. The District, based upon a number of factors

including the availability of Part B funds and the relative needs of the public and private school children residing within the District, has determined that individualized aides services will be provided only to children with most severe handicapping conditions.

6. The District has provided the Petitioner with publically funded physical, speech and occupational therapy consultation.

7. The Petitioner has multiple, moderate handicaps, including generally controllable seizures.

8. Mainstream placement was available through the District and could have been provided if the Petitioner were in the public school system.

9. Neither the District nor the Petitioner has acted in bad faith.

10. In establishing program benefits

under Part B of the Education For Handicapped Act, the District has determined that aide services will not be provided, either in the public schools or in private schools, to students with handicapping conditions or severity equal to or similar to Gabriel's. The District has established a priority system whereby only those students having the most severe handicapping conditions receive aide services.

11. The District has the discretion to determine program benefits and to establish priorities in the expenditure of Part B funds. Sigoloff, 1 EHLR, Page 211:277 (June 5, 1981); Gust, 1 EHLR, Page 211:155 (January 22, 1980); 34 C.F.R. Section 300.451.

12. Admission of evidence by the Administrative Hearing Officer of which the Petitioner received notice within five (5) days of the hearing was not an abuse of discretion or error.

13. The Administrative Hearing was consistent with the due process requirements of the IDAPA 08.02.E.12.3.N.

DECISION

The decision of the Administrative Hearing Officer is affirmed.

DATED this 8 day of May, 1984.

/s/ Wm. Lyman Belnap
WM. LYMAN BELNAP, Review Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8 day of May, 1984, I served a true and correct copy of the foregoing document upon the following persons:

J. Brent Marchbanks, Esq.
Coalition of Advocates for the Disabled
1510 West Washington
Boise, Idaho 83702

Stewart A. Morris, Esq.
Morris & Weaver
P. O. Box 1001
Boise, Idaho 83701

Martha Noffsinger
State of Idaho
Department of Education
Len B. Jordan Building
Boise, Idaho 83702

by depositing in the United States mail, postage prepaid, addressed to their last known addresses as set forth above.

/s/ Wm. Lyman Belnap
Wm. Lyman Belnap

UNITED STATES STATUTES

20 U.S.C.

§1401. Definitions.

As used in this title-- ...

(18) The term "free appropriate public education" means special education related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include the appropriate preschool, elementary, or secondary school education inn the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5) [20 USCS §1414(a)(5)].

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational

agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an

annual basis, whether instructional objectives are being achieved.

§1413. State plans

(a) Any State meeting the eligibility requirement set forth in Section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall--

. . .

(4) set forth policies and procedures assure--

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made

for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirement of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped

children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

§76.651 Responsibility of a State and a subgrantee.

(a)(1) A subgrantee shall provide students enrolled in private schools with a genuine opportunity for equitable participation in accordance with the requirements in §§ 76.652-76.662 and in the authorizing statute and implementing regulations for a program.

(2) The subgrantee shall provide that opportunity to participate in a manner that is consistent with the number of eligible private school students and their needs.

(3) The subgrantee shall maintain continuing administrative direction and control over funds and property that benefit students enrolled in private schools.

(b)(1) A State shall ensure that each

subgrantee complies with the requirements in §§76.651-76.662.

(2) If a State carried out a project directly, it shall comply with these requirements as if it were a subgrantee.

Subpart D--Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

§300.400 Applicability of §§300.401-300.403.

Sections 300.401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

§300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

§300.402 Implementation by State educational agency.

In implementing §300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site

visits, and parent questionnaires;

(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and

(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

§300.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under §§300.450-300.460.

(b) Disagreements between a parent and

a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under §§300.500-300.514 of Subpart E.

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES.

§300.450 Definition of "private school handicapped children."

As used in this part, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under §§300.400-300.402.

§300.451 State educational agency responsibility.

The State educational agency shall insure that--

(a) To the extent consistent with their number and location in the State, provision is made for the participation of

private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and

(b) The requirements in 34 CFR 76.651-76.663 of EDGAR are met.

§300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

LEAST RESTRICTIVE ENVIRONMENT

§300.550 General.

...

(b) Each public agency shall insure,

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and ...

UNITED STATES DEPARTMENT OF EDUCATION
Washington, D.C. 20202

November, 1983

Dr. Joseph C. Reed
Coordinator, Ancillary and Support
Services
Office for Handicapped Children
Wyoming Department of Education
Hathaway Building
Cheyenne, Wyoming 82002

Dear Dr. Reed:

Thank you for your letter to Thomas Irvin concerning services to handicapped children voluntarily enrolled in private schools by their parents. There are two issues involved in your letter, (1) provisions for evaluations, staffings, and individualized education programs (IEPs) for children placed in private schools by their parents, and (2) the extent to which special edcuation and related services must be provided to handicapped children placed in private schools by their parents.

The first issue is specifically addressed in the regulations implementing Part B of the Education for the Handicapped Act (EHA-B) found at 34 CFR Part 300. Section 300.220 requires local educational agencies to have procedures which ensure that "all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated..." The comment after §300.220 explains that this requirement applies to children in private

agencies and institutions within the local educational agency's jurisdiction.

In addition to the local education agency's responsibility, the State educational agency is mandated under Section 613(a)(4)(A) of the EHA to provide for the "participation of such children in the program assisted or carried out under [the EHA-B] by providing for such children special education and related services." This obligation exists even if the parents have refused appropriate placement offered by a public agency.

Both the EHA-B regulations (§§300.450-300.452) and the Education Department General Administrative Regulations (EDGAR, §§76.651-76.662) apply to the issue of the extent to which special education and related services must be provided to handicapped children placed in private schools by their parents. Section 300.452 states that "Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency."

The nature of services which must be provided and the manner in which those services must be made available are contained in the EDGAR rules cited above. State and local educational agencies have some flexibility in selecting the means by which private private [sic] school handicapped children will receive benefits. However, LEAs must (1) provide students enrolled in private schools with a genuine opportunity for equitable participation; (2) consult with private school representatives on how services will be provided to private school children under each program authorized; (3) spend the same average amount of program

funds (i.e., Part B funds) on students enrolled in private schools, unless the average cost of serving these students is different; and (4) provide private school handicapped students with services and an opportunity for participation that is comparable in quality, scope, and opportunity for participation in the program benefits that the public school students receive under the program.

Since the enactment of the statute, Special Education Programs has issued some policy interpretations regarding services to private school children voluntarily enrolled by their parents. Essential contents of these letters are:

- Local school districts are required to include private schools in their child find efforts.

- While local school districts are not required to provide a free appropriate public education (FAPE) to handicapped children placed in private schools by their parents, LEAs are required to (1) have FAPE available to these children should they return to public school, and (2) provide these children with an opportunity to participate in programs funded under EHA-B.

- School districts may require dual enrollments as a condition of making programs funded under EHA-B available to these children. Dual enrollment would not obligate school districts to provide FAPE to these children, but they must

make programs available to meet the needs of these children.

- Any special education or related services provided to these children must be done in accordance with an individualized education program (IEP) developed in conjunction with the private school. The IEP would be limited in scope to cover only the limited services to be offered by the LEA.

- These children can be counted under the annual Part B child count if the services are provided in accordance with an IEP.

- Private schools must be involved in the development of the LEA's application for Part B funds.

Enclosed is a copy of the Part B and EDGAR requirements to which I have referred in this letter. I hope this information will be helpful to you as you prepare guidelines for your LEAs. Please do not hesitate to contact me if I can be of further assistance on this matter.

Sincerely,

David Rostetter
Acting Director
Division of Assistance
to States

Enclosures